Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OFFICE OF THE CLERK

THE CITY OF NEW YORK,

Petitioner,

v.

THE PERMANENT MISSION OF INDIA TO THE UNITED STATES and THE BAYARYN JARGALSAIKHAN, as principal resident representative to the United Nations of the Mongolian People's Republic,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Foreign Missions Act, 22 U.S.C. §§ 4301 *et seq.* (the "FMA"), authorizes the Secretary of State (the "Secretary") to regulate foreign missions' access to designated "benefits," and to preempt State and local police powers by denying "benefits" to foreign missions.

1. Relying solely on the FMA, the Secretary "designated," as a "benefit" for foreign missions, over $100 million dollars in preemptive exemptions from State and local property tax laws. In determining whether Congress authorized the Secretary to preempt traditional State taxing powers, did the Court of Appeals err by deferring to the Secretary's expansive interpretation of her own FMA powers, rather than requiring a clear and manifest expression of Congressional intent?

2. Did the Court of Appeals further err by misreading the FMA as authorizing the Secretary's preemption of State and local property tax laws?

3. Did the Court of Appeals depart from this Court's clear precedent by upholding the Secretary's creation and conferral of retroactive tax exemptions under the FMA, even though Congress did not authorize the Secretary, expressly or otherwise, to promulgate retroactive rules?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	1
BASIS FOR JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	7
A. Introduction	7
B. Respondents' Mission Property	9
C. This Litigation	9
1. This Court rejects Respondents' and the United States' jurisdictional arguments	9
2. The District Court proceedings	11
3. The United States purports to nullify Petitioner's judgments and tax liens	11
4. The Court of Appeals' opinion	13

Table of Contents

Page

REASONS FOR GRANTING THE PETITION 14

I. ABSENT A CLEAR AND MANIFEST EXPRESSION OF CONGRESSIONAL INTENT TO AUTHORIZE AGENCY PREEMPTION OF HISTORICAL STATE POWERS, COURTS SHOULD REJECT AGENCY PREEMPTION, RATHER THAN DEFERRING TO THE AGENCY'S INTERPRETATION OF ITS OWN PREEMPTIVE POWERS 17

A. The Presumption against Preemption Ensures that Congress, Rather than the Judiciary or the Executive, Controls the Scope of Federal Preemption 17

B. When Congress Does Not Clearly and Manifestly Express its Intent to Delegate Preemptive Powers to an Agency, the Agency's Interpretation of its Preemptive Powers Should Receive No Deference 22

Table of Contents

Page

II. THE SECRETARY'S NOTICE, WHICH PURPORTS TO CREATE AND CONFER PREEMPTIVE NEW PROPERTY TAX EXEMPTIONS FOR FOREIGN MISSIONS, IS INVALID .. 26

A. The FMA Does Not Clearly and Manifestly Express Congressional Intent to Authorize the Secretary's Preemption of State and Local Tax Laws 26

1. The FMA's "benefits" provisions do not allow the Secretary to create preemptive new tax exemptions for foreign missions 26

2. The FMA's preemption provision does not allow the Secretary to preempt State and local property tax laws 31

B. Departing from Precedent, the Court of Appeals Erroneously Held that the FMA Allows the Secretary to Preempt State and Local Tax Laws .. 34

III. THE COURT OF APPEALS APPLIED AN UNPRECEDENTED AND ERRONEOUS TEST TO HOLD THAT THE SECRETARY MAY ISSUE RETROACTIVE RULES 38

CONCLUSION 40

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED AUGUST 17, 2010 ..... 1a

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DECIDED MARCH 17, 2008 ..... 71a

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DECIDED FEBRUARY 8, 2008, FILED FEBRUARY 11, 2008 ..... 77a

TABLE OF CITED AUTHORITIES

Page

CASES

Altria Group, Inc. v. Good,
555 U.S. 70, 129 S. Ct. 538 (2008) 17, 22, 32

American Ship Bldg. Co. v. NLRB,
380 U.S. 300 (1965) 24

American Bar Ass'n v. FTC,
430 F.3d 457 (D.C. Cir. 2005) 33

Barclays Bank PLC v. Franchise Tax Bd.,
512 U.S. 298 (1994) 19

Bates v. Dow Agrosciences LLC,
544 U.S. 431 (2005) 17

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 38

Canton Police Benevolent Ass'n v. United States,
844 F.2d 1231 (6th Cir. 1988) 30

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) ..... *passim*

Christensen v. Harris County,
529 U.S. 576 (2000) 35

Cited Authorities

	Page
Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)	15, 31
City of Columbus v. Ours Garage & Wrecker Serv., 536 U.S. 424 (2002)	32
City of New York v. FCC, 486 U.S. 57 (1988)	16, 18
City of New York v. Permanent Mission of India, 376 F. Supp. 2d 429 (S.D.N.Y. 2005)	10
City of New York v. Permanent Mission of India, 446 F.3d 365 (2d Cir. 2006)	10
City of New York v. Permanent Mission of India, 618 F.3d 172 (2d Cir. 2010)	7, 9
Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000)	21
CSX Transp. v. Easterwood, 507 U.S. 658 (1993)	20
Cuomo v. Clearing House Ass'n, __ U.S. __, 129 S. Ct. 2710 (2009)	25

Cited Authorities

Page

Department of Revenue v. ACF Indus., Inc.,
510 U.S. 332 (1994) 7, 17

Desiano v. Warner-Lambert & Co.,
467 F.3d 85 (2d Cir.), *as corrected by*,
2006 U.S. App. LEXIS 32377 (2d Cir. Oct. 5,
2006), *aff'd by equally divided court*,
552 U.S. 440 (2008) 18, 19

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 36

Fernandez-Vargas v. Gonzales,
548 U.S. 30 (2006) 39

Fidelity Fed. Sav. & Loan Ass'n v.
De la Cuesta,
458 U.S. 141 (1982) 16, 18

Freightliner Corp. v. Myrick,
514 U.S. 280 (1995) 31

Garcia v. San Antonio Metro. Trans. Auth.,
469 U.S. 528 (1985) 19

Geier v. American Honda Motor Co.,
529 U.S. 861 (2000) 20

General Dynamics Land Sys. v. Cline,
540 U.S. 581 (2004) 23

Cited Authorities

Page

Gonzales v. Oregon,
546 U.S. 243 (2006) 19, 23

Gregory v. Ashcroft,
501 U.S. 452 (1991) 20

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 31

Hamdan v. Rumsfeld,
548 U.S. 557 (2006) 39

Hi-Craft Clothing Co. v. NLRB,
660 F.2d 910 (3d Cir. 1981) 24

INS v. Aguirre-Aguirre,
526 U.S. 415 (1999) 22-23

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 23

INS v. St. Cyr,
533 U.S. 289 (2001) 38

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 38, 40

Louisiana Public Serv. Comm'n v. FCC,
476 U.S. 355 (1986) ..... *passim*

Cited Authorities

Page

Lynnbrook Farms v. Smithkline Beecham Corp., 79 F.3d 620 (7th Cir.), *cert. denied*, 519 U.S. 867 (1996) 16

Massachusetts v. EPA, 549 U.S. 497 (2007) 30

:dellin v. Texas, 552 U.S. 491 (2008) 22

Morgan v. Commissioner, 309 U.S. 78 (1940) 27

National City Bank v. Turnbaugh, 463 F.3d 325 (4th Cir. 2006), *cert. denied*, 550 U.S. 913 (2007) 16

New York State Rest. Ass'n v. New York City Bd. of Health, 556 F.3d 114 (2d Cir. 2009) 32

New York v. FERC, 535 U.S. 1 (2002) 16, 24, 34

Palestine Information Office v. Shultz, 853 F.2d 932 (D.C. Cir. 1988) 25

Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193 (2007) 8, 10, 37

Cited Authorities

Page

Republic of Austria v. Altmann,
541 U.S. 677 (2004) 23, 24, 38, 39

Republic of Iraq v. Beaty,
__ U.S. __, 129 S. Ct. 2183 (2009) 39

Riegel v. Medtronic, Inc.,
552 U.S. 312 (2008) 25

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 23, 25, 36

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng.,
531 U.S. 159 (2001) ..... *passim*

Sprint Spectrum L.P. v. Mills,
283 F.3d 404 (2d Cir. 2002) 31

Toll v. Moreno,
458 U.S. 1 (1982) 21

United States v. Mead Corp.,
533 U.S. 218 (2001) 23

Verlinden B.V. v. Central Bank of Nigeria,
461 U.S. 480 (1983) 10

Wabash Valley Power Ass'n v. Rural Electrification Admin.,
988 F.2d 1480 (7th Cir. 1993) 15, 18

Page

Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003) 30

Watt v. Alaska, 451 U.S. 259 (1981) 36

Watters v. Wachovia Bank, 550 U.S. 1 (2007) 19, 20, 25

Wyeth v. Levine, __ U.S. __, 129 S. Ct. 1187 (2009) ..... *passim*

Zemel v. Rusk, 381 U.S. 1 (1965) 31

STATUTES

5 U.S.C. § 553(a)(1) 14

8 U.S.C. § 1189(a)(1) 28

22 U.S.C. § 288c 20

22 U.S.C. §§ 4301 *et seq.* ..... *passim*

22 U.S.C. § 4302 ..... *passim*

22 U.S.C. § 4303 ..... *passim*

22 U.S.C. § 4304 ..... *passim*

Cited Authorities

	Page
22 U.S.C. § 4305	5
22 U.S.C. § 4307	5, 12, 32, 33
22 U.S.C. § 4308	6
22 U.S.C. § 4312	6, 37
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1441(d)	10
28 U.S.C. § 1602	8, 10
28 U.S.C. § 1604	10
28 U.S.C. § 1605(a)(4)	10
31 U.S.C. § 5313(b)	28
47 U.S.C. § 251(e)	27
Omnibus Appropriations Act of 2009, Public Law 111-8, 123 Stat. 524, § 7055 (2009)	7-8
REGULATIONS	
52 Fed. Reg. 5372 (Feb. 20, 1987)	27
74 Fed. Reg. 31788 (July 2, 2009)	*passim*

Page

LEGISLATIVE MATERIALS

House Report No. 97-102, Pt. 1 (Committee on Foreign Affairs, May 19, 1981) 12, 27, 28

House Report No. 97-693 (Conference Report, Aug. 3, 1982) 28, 33, 36

Senate Report No. 97-283 (Committee on Foreign Relations, Nov. 30, 1981) 11, 12, 27, 28

Senate Report No. 97-329 (Committee on Governmental Affairs, Apr. 8, 1982) 29, 33, 36

OTHER AUTHORITIES

2 U.S. Dept. of State Foreign Affairs Manual § 271.1 36

Alexander Hamilton, Federalist No. 32 7

Presidential Memorandum, 74 Fed. Reg. 24693 (May 22, 2009) 37

Webster's New World College Dictionary (4th ed. 2001) 27

OPINIONS BELOW

This petition seeks review of a Court of Appeals judgment entered under docket numbers 08-1805-cv and 08-1806-cv (consolidated for disposition). The Court of Appeals' opinion (App. 1a-70a) is reported at 618 F.3d 172 (2d Cir. 2010).

Earlier, the District Court entered an Opinion and Order (App. 77a-104a), reported at 533 F. Supp. 2d 457 (S.D.N.Y. Feb. 11, 2008), as well as a Memorandum Order and Final Judgment (App. 71a-76a), reported at 538 F. Supp. 2d 701 (S.D.N.Y. Mar. 17, 2008).

BASIS FOR JURISDICTION

The Court of Appeals' judgment was entered on August 17, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) (2000).

STATUTORY PROVISIONS INVOLVED

Foreign Missions Act, 22 U.S.C. §§ 4301 *et seq.*

> § 4301. Congressional declaration of findings and policy.
>
> * * *
>
> (b) Policy. The Congress declares that it is the policy of the United States to support the secure and efficient operation of United States missions abroad, to facilitate the secure and efficient operation in the United States

of foreign missions and public international organizations and the official missions to such organizations, and to assist in obtaining appropriate benefits, privileges, and immunities for those missions and organizations and to require their observance of corresponding obligations in accordance with international law.

(c) Treatment of foreign missions in United States. The treatment to be accorded to a foreign mission in the United States shall be determined by the Secretary [of State] after due consideration of the benefits, privileges, and immunities provided to missions of the United States in the country or territory represented by that foreign mission, as well as matters relating to the protection of the interests of the United States.

§ 4302. Definitions

(a) For purposes of this title–

(1) "benefit" (with respect to a foreign mission) means any acquisition, or authorization for an acquisition, in the United States by or for a foreign mission, including the acquisition of–

(A) real property by purchase, lease, exchange, construction, or otherwise,

(B) public services, including services relating to customs, importation, and utilities, and the processing of applications or requests relating to public services,

(C) supplies, maintenance, and transportation,

(D) locally engaged staff on a temporary or regular basis,

(E) travel and related services,

(F) protective services, and

(G) financial and currency exchange services,

and includes such other benefits as the Secretary may designate;

* * *

(b) Determinations with respect to the meaning and applicability of the terms used in subsection (a) shall be committed to the discretion of the Secretary.

§ 4303. Authorities of the Secretary of State

The Secretary shall carry out the following functions:

(1) Assist agencies of Federal, State, and municipal government with regard to ascertaining and according benefits, privileges, and immunities to which a foreign mission may be entitled.

(2) Provide or assist in the provision of benefits for or on behalf of a foreign mission in accordance with section 204 [22 U.S.C. § 4304].

* * *

§ 4304. Provision of benefits

(a) Request by foreign mission; terms and conditions as approved by Secretary. Upon the request of a foreign mission, benefits may be provided to or for that foreign mission by or through the Secretary on such terms and conditions as the Secretary may approve.

(b) Benefits through Secretary as mandatory; compliance with terms and conditions. If the Secretary determines that such action is reasonably necessary on the basis of reciprocity or otherwise–

(1) to facilitate relations between the United States and a sending State,

(2) to protect the interests of the United States,

> (3) to adjust for costs and procedures of obtaining benefits for missions of the United States abroad, [or]
>
> (4) to assist in resolving a dispute affecting United States interests and involving a foreign mission or sending State . . .

then the Secretary may require a foreign mission (A) to obtain benefits from or through the Secretary on such terms and conditions as the Secretary may approve, or (B) to forego the acceptance, use, or relation of any benefit or to comply with such terms and conditions as the Secretary may determine as a condition to . . . the application for or acceptance of any benefit (including any benefit from or authorized by any Federal, State, or municipal governmental authority, or any entity providing public services).

§ 4307. Preemption

Notwithstanding any other law, no act of any Federal agency shall be effective to confer or deny any benefit with respect to any foreign mission contrary to this title. Nothing in [22 U.S.C. §§ 4302 (definitions), 4303 (Secretary of State's authorities), 4304 (provision of benefits) or 4305 (property of foreign missions)] may be construed to preempt any State or municipal law or governmental authority regarding zoning, land use, health,

safety, or welfare, except that a denial by the Secretary involving a benefit for a foreign mission within the jurisdiction of a particular State or local government shall be controlling.

* * *

§ 4308. General provisions

(a) Issuance of regulations. The Secretary may issue such regulations as the Secretary may determine necessary to carry out the policy of this title.

* * *

(g) Discretion of Secretary. Except as otherwise provided, any determination required under this title shall be committed to the discretion of the Secretary.

* * *

§ 4312. Presidential guidelines

The authorities granted to the Secretary pursuant to the provisions of this title shall be exercised in accordance with procedures and guidelines approved by the President.

STATEMENT OF THE CASE

A. Introduction.

Since the nation's founding, the power to tax has been regarded as vital to the existence, independence and operation of the States. *See, e.g., Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 344-45 (1994) (state taxing authority is "central to state sovereignty"); Alexander Hamilton, Federalist No. 32 ("individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants").

Historically, the Secretary deferred to the States' exercise of their taxing powers unless international law, a bilateral agreement, or a treaty specifically dictated otherwise. *See* Brief for Plaintiff-Appellee in Response to Amicus at 9-12, *City of New York v. Permanent Mission of India*, 618 F.3d 172 (2d Cir. 2010) (No. 08-1805). In fact, the United States Department of State (the "State Department") has long advised foreign countries that their United Nations ("U.N.") mission and consular property used for staff housing – specifically including property at issue in this litigation – was subject to local property taxation. *See* Brief for Plaintiff-Appellee at 15-17, *City of New York v. Permanent Mission* (No. 08-1805).

Congress has also directed the Secretary, in several appropriations acts, to withhold from foreign aid payments 110% of a foreign government's unpaid property tax judgments. *See, e.g.*, Omnibus Appropriations Act of 2009, Public Law 111-8, 123 Stat.

524, § 7055 (2009). Moreover, this Court held at an earlier stage of this litigation that the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* (the "FSIA"), affords federal subject matter jurisdiction over claims to establish the validity of tax liens on property owned by foreign sovereigns. *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193 (2007).

Nevertheless, two years after this Court's remand, 15 months after the District Court entered judgments on the merits in favor of Petitioner exceeding $50 million, and one week before the Court of Appeals was to hear appeals from the judgments, the Secretary issued an informal "Notice" under the FMA purporting to exempt staff housing from State and local property taxes. Issued without any opportunity for public comment, the Notice claims to: (1) nullify Petitioner's property tax judgments against Respondents Permanent Mission of India ("India") and Bayaryn Jargalsaikhan ("Mongolia") (collectively, "Respondents"); (2) preempt State and local taxation of staff housing; and (3) extinguish, retroactively, existing tax liens on such properties. The Notice purports to deprive Petitioner (home to approximately 300 foreign consulates and U.N. missions), and over 200 other municipal hosts of foreign consulates, of the power to collect real property taxes on staff housing.

By relying exclusively on her FMA powers to issue the Notice, the Secretary tacitly conceded that the new property tax exemption is *not* required under international or treaty law.

B. Respondents' Mission Property.

India owns and operates a twenty-six story building at 235 East 43rd Street in Manhattan (IA259).[1] The first six floors of the building contain offices of India's Permanent Mission to the U.N., and are tax exempt (IA14[¶12]). Starting in 1991, Petitioner assessed real property taxes with respect to the upper twenty floors of the building, which house staff of India's Permanent Mission to the U.N. and of the Indian consulate (IA14[¶12]; IA15[¶16]).

Mongolia owns and operates a six-story building located at 6 East 77th Street in Manhattan (MA11[¶¶2-3]). The first two floors are used as offices of Mongolia's Permanent Mission to the U.N., and the third floor contains the residence of Mongolia's Ambassador to the U.N. (MA12[¶11]). Two floors are devoted exclusively to housing for other staff of Mongolia's Permanent Mission to the U.N. (*id.*). At least since 1980, Petitioner assessed real property taxes with respect to these two floors (MA12[¶12]).

C. This Litigation.

1. This Court rejects Respondents' and the United States' jurisdictional arguments.

Petitioner commenced these cases in Supreme Court, New York County, on April 2, 2003. In its

1. Numbers in parentheses preceded by the letters "IA" refer to pages in the Joint Appendix submitted to the Court of Appeals in *City of New York v. Permanent Mission of India*, 618 F.3d 172 (2d Cir. 2010) (No. 08-1805), and numbers in parentheses preceded by the letters "MA" refer to pages in the Joint Appendix submitted to the Court of Appeals in *City of New York v. The Bayaryn Jargalsaikhan*, 618 F.3d 172 (2d Cir. 2010) (No. 08-1806).

Amended Complaints, Petitioner sought judgments for unpaid property taxes, plus interest, and a declaration of the validity of its tax liens (IA12-20; MA10-19).

After removing both cases to the District Court pursuant to 28 U.S.C. § 1441(d), Respondents moved to dismiss for lack of subject matter jurisdiction based on the FSIA. Enacted in 1976, the FSIA transferred the responsibility for making sovereign immunity determinations from the State Department to the federal judiciary. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-88 (1983); 28 U.S.C. § 1602. With certain specified exceptions, the FSIA renders foreign states immune from federal court jurisdiction. 28 U.S.C. § 1604.

Denying Respondents' motions, the District Court reasoned that Petitioner's lawsuit to establish the validity of tax liens fell within an exception to FSIA immunity for cases involving "rights in immovable property situated in the United States." *City of New York v. Permanent Mission of India*, 376 F. Supp. 2d 429 (S.D.N.Y. 2005); 28 U.S.C. § 1605(a)(4). Notwithstanding the contrary views expressed by the United States, the Court of Appeals affirmed. *See City of New York v. Permanent Mission of India*, 446 F.3d 365, 376 n.17 (2d Cir. 2006).

Affirming the Court of Appeals and rejecting the arguments of the United States as *amicus curiae*, this Court held that the FSIA "immovable property" exception to sovereign immunity afforded the District Court jurisdiction over Petitioner's lawsuit. *Permanent Mission*, 551 U.S. 193 (2007).

2. The District Court proceedings.

On remand, the District Court, finding that the Vienna conventions permit the taxation of staff housing, granted Petitioner summary judgment "validating the liens and assessing taxes against" Respondents (App. 77a-104a). Subsequently, the District Court entered final judgment against India in the amount of $42,451,769.35 in taxes, charges, and interest, and against Mongolia in the amount of $4,395,003.13 in taxes and interest (App. 71a-76a).

3. The United States purports to nullify Petitioner's judgments and tax liens.

Respondents appealed to the Court of Appeals. Nine days before the initially-scheduled oral argument, the United States moved for leave to file an *amicus* brief out of time. Attached to its proposed *amicus* brief was a "Public Notice" entitled "Designation and Determination Under the [FMA]" issued by the State Department and dated June 23, 2009 (the "Notice"). *See* 74 Fed. Reg. 31788 (July 2, 2009).

Congress enacted the FMA in 1982, to give the Secretary tools for calibrating the "conditions under which foreign missions operate in the United States . . . to reflect the conditions under which missions of the United States are required to operate in the countries represented by such foreign missions." Senate Report No. 97-283 (Committee on Foreign Relations, Nov. 30, 1981), at 1-2. Aware that foreign countries imposed a variety of restrictions on U.S. missions abroad, Congress enabled the Secretary to impose reciprocal restrictions

on foreign missions in the U.S. – *i.e.*, to "make the punishment fit the crime." House Report No. 97-102, Pt. 1 (Committee on Foreign Affairs, May 19, 1981), at 27.

To that end, the FMA provides "mechanisms whereby the operations of foreign missions in the United States and the benefits available to them from Federal, State and local authorities . . . may be cleared through the Federal Government and adjusted according to United States needs." S. Rep. No. 97-283 at 1-2; *see also* H.R. Rep. No. 97-102 at 27. Specifically, the FMA allows the Secretary to regulate foreign missions' acquisitions of real property, goods, services, and other designated "benefits." *See* 22 U.S.C. §§ 4302(a)(1), 4303(1), 4304(a-b). Consistent with these provisions, FMA § 4307, entitled "Preemption," provides that only "a denial by the Secretary involving a benefit for a foreign mission" may preempt local laws regarding "zoning, land use, health, safety, or welfare."

Invoking the Secretary's FMA powers, the Notice purports to create retroactive and prospective local property tax exemptions for property owned by foreign governments and used to house the staff of permanent missions to the U.N. and consular posts. "[A]ny state or local laws to the contrary," the Notice proclaims, "are hereby preempted." With respect to affected staff housing, the Notice announces an "exemption from property taxes . . . that have been or will be assessed against any foreign government." While declaring existing tax liens nullified, the Notice does not "require refund of any taxes previously paid." The Notice further asserts that foreign policy concerns warrant the

Secretary's creation and conferral of these local law tax exemptions. 74 Fed. Reg. 31788.

In its Court of Appeals *amicus* brief, the United States argued that the Notice required *vacatur* of the District Court's judgments and dismissal of the case. Responding, Petitioner contended that the Secretary's attempt to create and confer new local law tax exemptions exceeded the authority Congress granted the Secretary in the FMA.

4. The Court of Appeals' opinion.

By order dated August 17, 2010, the Court of Appeals (Calabresi, J., Hall, J., and Sessions, D.J.), without reaching the international law questions decided below, deemed the Notice valid, vacated the District Court's opinion, reversed the District Court's judgments, and remanded the case with instructions to dismiss Petitioner's actions (App. 1a-70a). The Court of Appeals held that the FMA allows the Secretary to preempt local tax laws by asserting, in an informal Federal Register notice, that the Secretary has "designated" a local law tax exemption as an FMA "benefit," and can grant that "benefit" to foreign missions prospectively and retroactively.

By allowing the Secretary to "designate" and "provide" benefits to foreign missions, the Court of Appeals reasoned, Congress authorized the Secretary to create and confer local law tax exemptions (App. 20a-31a). The Court of Appeals further reasoned that because the FMA delegates broad authority to the Secretary, and is explicit in shielding from preemption

only laws passed in the exercise of State and local police powers, the Secretary is free to preempt State and local tax laws (App. 31a-42a).

Turning to retroactivity, the Court of Appeals acknowledged that the Notice claimed retroactive effect, and that nothing in the FMA explicitly authorizes the Secretary to promulgate retroactive rules (App. 43a-44a, 62a). After analyzing Petitioner's expectations and reliance – factors normally considered only to determine whether a statute or rule operates retroactively, not whether Congress authorized retroactive rule-making – the Court of Appeals declined to apply the presumption against retroactivity, and upheld the Notice's retroactive application (App. 44a-63a).

Finally, the Court of Appeals interpreted the Administrative Procedure Act's "foreign affairs" exception to notice-and-comment rule-making, 5 U.S.C. § 553(a)(1), as permitting the Secretary to preempt local tax laws by publishing an informal foreign missions "Notice" in the Federal Register, without providing notice and inviting comment (App. 63a-69a).

REASONS FOR GRANTING THE PETITION

1. This Court should grant *certiorari* to clarify the test courts should apply when analyzing the authority of federal agencies to preempt State and local laws, especially those passed in the exercise of traditional State powers.

Recently, this Court confirmed that "'[i]n all preemption cases . . . we 'start with the assumption that

the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress'." *Wyeth v. Levine*, __ U.S. __, 129 S. Ct. 1187, 1194-95 (2009) (citing cases). Congress may express its preemptive intent explicitly, in the language of a statute, or implicitly, in the statute's structure and purpose, but Congress must express its intent clearly and manifestly. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). This principle is known as the "presumption against preemption" or the "clear statement rule."

By authorizing a federal agency to regulate in a particular area, Congress clearly (albeit implicitly) expresses its intent that agency regulations falling squarely within the scope of the agency's substantive authority have preemptive effect. *See, e.g., Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority").

Interpretive difficulties arise, however, when a federal agency purports to exercise preemptive powers not clearly conveyed by Congress. Properly applying the presumption, some courts construe ambiguities regarding the agency's authority against preemption, and decline to give deference to the agency's interpretation of its own preemptive powers under the governing statute. *See, e.g., Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng.*, 531 U.S. 159, 172-74 (2001); *Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 988 F.2d 1480, 1485-86, 1490 (7th Cir. 1993).

By contrast, some federal appellate courts, including the Court of Appeals here, have erroneously discounted the presumption against preemption, and deferred to the federal agency's interpretation that the relevant statute authorizes agency preemption. *See, e.g.*, *National City Bank v. Turnbaugh*, 463 F.3d 325 (4th Cir. 2006), *cert. denied*, 550 U.S. 913 (2007); *Lynnbrook Farms v. Smithkline Beecham Corp.*, 79 F.3d 620, 627 (7th Cir.) (presumption "can be overcome by an agency's clear declaration of intent to preempt state law"), *cert. denied*, 519 U.S. 867 (1996). This incorrect approach to agency preemption stems from *City of New York v. FCC*, 486 U.S. 57 (1988), *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982), and *dicta* in *New York v. FERC*, 535 U.S. 1, 18 (2002) (determining agency's statutory authority "without any presumption one way or the other").

This Court should grant *certiorari* to clarify that federal agencies have only as much preemptive authority as Congress clearly and manifestly intended to grant. If traditional tools of statutory interpretation do not reveal that Congress clearly and manifestly intended to authorize agency preemption, courts should apply the presumption and reject agency preemption as unauthorized.

2. This Court should also grant *certiorari* to correct the Court of Appeals' misapplication of retroactivity principles. Under this Court's clear precedent, a federal agency may only promulgate retroactive rules if Congress has expressly authorized the agency to do so. The Court of Appeals erroneously held that an agency may promulgate a substantive retroactive rule even without express Congressional authorization.

I. ABSENT A CLEAR AND MANIFEST EXPRESSION OF CONGRESSIONAL INTENT TO AUTHORIZE AGENCY PREEMPTION OF HISTORICAL STATE POWERS, COURTS SHOULD REJECT AGENCY PREEMPTION, RATHER THAN DEFERRING TO THE AGENCY'S INTERPRETATION OF ITS OWN PREEMPTIVE POWERS.

A. The Presumption against Preemption Ensures that Congress, Rather than the Judiciary or the Executive, Controls the Scope of Federal Preemption.

"'[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Wyeth*, 129 S. Ct. at 1194 (citations omitted).

"'[I]n all pre-emption cases,'" courts start with the assumption that federal law cannot supersede historic State powers (including State taxing powers) "'unless that was the clear and manifest purpose of Congress.'" *Wyeth*, 129 S. Ct. at 1194-95 (citations omitted); *see also Altria Group, Inc. v. Good*, 555 U.S. 70, __, 129 S. Ct. 538, 543 (2008) (same); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (same); *Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 344 (1994) (had Congress intended to limit State power to exempt property from real property taxes, it "would have spoken with clarity and precision").

A federal agency may preempt State and local laws, but only if "Congress intended that federal regulation supersede state law." *Louisiana*, 476 U.S. at 369, 374. The question here is whether the presumption against

preemption applies when a federal agency exercises preemptive power that Congress did not clearly grant.

Federal courts provide two competing ways in which to answer this question. Like the Court of Appeals here (App. 35a-36a), some courts – rejecting or ignoring the presumption – consider whether the preemptive regulation falls within the scope of the agency's delegated authority. In *City of New York* and *De la Cuesta*, for example, this Court found that Congress' delegation of regulatory authority to an agency necessarily encompassed preemptive authority. *City of New York*, 486 U.S. at 63-64 (to preempt State law, agency must "properly exercise[ ] its own delegated authority"); *De la Cuesta*, 458 U.S. at 153-54 (federal board may preempt State law by promulgating regulation "within the scope of the [b]oard's delegated authority").

Other courts allow federal agencies to preempt State and local law only where Congress has expressed – clearly and manifestly, if not explicitly – an intention to grant the agency such authority. *See, e.g., Solid Waste*, 531 U.S. at 172-73 (where agency "invokes the outer limits of Congress' power," and "alters the federal-state framework," courts look for "clear indication that Congress intended that result"); *Wabash Valley*, 988 F.2d at 1485-86, 1490 (preemptive regulations must overcome the presumption); *see also Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 97 n.9 (2d Cir.) (Calabresi, J.) (federal agencies arguably "cannot supply, on Congress's behalf, the clear legislative statement of intent required to overcome the presumption against preemption"), *as corrected by* 2006 U.S. App. LEXIS

32377 (2d Cir. Oct. 5, 2006), *aff'd by equally divided court*, 552 U.S. 440 (2008).

This Court should grant *certiorari* to clarify that federal agencies may exercise only the preemptive powers that Congress clearly and manifestly intended to grant.

Given its sensitivity to State interests and its political accountability, Congress – rather than the Judicial or Executive branches – must decide the extent to which federal statutes displace State law. *See, e.g., Watters v. Wachovia Bank*, 550 U.S. 1, 41 (2007) (Stevens, J., dissenting) ("'[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States . . . .'") (citations omitted); *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 552 (1985) ("procedural safeguards inherent in the structure of the federal system" create political process that effectively protects State interests); *see also Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 328-31 (1994) (Congress, rather than the Judiciary, has authority to decide "'how to balance a particular risk of retaliation [by foreign governments] against the sovereign right of the United States as a whole to let the States tax as they please'") (citation omitted).

Applying the presumption to determine an agency's preemptive authority advances federalism principles, which "belie the notion that Congress would use an obscure grant of authority [to a federal agency] to regulate areas traditionally supervised by the States' police power." *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006). If Congress must clearly and manifestly express its intent to authorize agency preemption, then

preemption is likely to occur only at the direction of Congress, rather than at the whim of a federal agency expansively interpreting its own powers. *See, e.g.*, *Watters*, 550 U.S. at 41 (Stevens, J., dissenting) ("'with relative ease,'" agencies can promulgate "'regulations that have broad pre-emption ramifications for state law'") (citation omitted); *Geier v. American Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting) (application of presumption "becomes crucial when the pre-emptive effect of an administrative regulation is at issue"); *CSX Transp. v. Easterwood*, 507 U.S. 658, 679 (1993) (Thomas, J., concurring in part and dissenting in part) ("Respect for the presumptive sanctity of state law should be no less when federal pre-emption occurs by administrative fiat rather than by congressional edict."). The presumption against preemption provides a critical check on the Executive's power to preempt.

Application of the presumption is particularly appropriate here, because the Secretary's informal Notice encroaches upon a traditional and essential State power: the power to tax. *See Wyeth*, 129 S. Ct. at 1194 (presumption particularly applicable when Congress legislates in a field traditionally occupied by the States); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (when federal law threatens to upset "the usual constitutional balance of federal and state powers," clear statement rule respects States' "substantial sovereign powers").

Moreover, the Notice "invokes the outer limits of Congress' power." *Solid Waste*, 531 U.S. at 172. In 1945, Congress exempted designated international organizations from federally-imposed property taxes, 22 U.S.C. § 288c, but the Senate Finance Committee

believed it was "wholly beyond the power of Congress" to grant an exemption from State and local property taxes. *See Toll v. Moreno*, 458 U.S. 1, 34-35 & nn.5-7 (1982) (Rehnquist, J., dissenting) (citing 91 Cong. Rec. 12432 [1945]). Had Congress intended to grant the Secretary the extraordinary power to create State and local property tax exemptions for foreign missions and consulates, Congress would have expressed that intent clearly and manifestly in the FMA. *See Solid Waste*, 531 U.S. at 172-73.

The Secretary issued the Notice "to facilitate relations between the United States and foreign states." 74 Fed. Reg. 31788. But the Secretary cannot avoid the presumption simply because the FMA touches on foreign affairs. As this Court recently reiterated, the presumption applies "in all pre-emption cases." *Wyeth*, 129 S. Ct. at 1194-95; *cf. Crosby v. National Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000) (leaving "for another day" whether the presumption applies when a federal foreign affairs statute arguably preempts historic State powers).

At any rate, the Secretary's claim that local taxation of mission and consular staff housing "has become a major irritant in the United States' bilateral relations," 74 Fed. Reg. 31788, is irrelevant to determining the scope of the Secretary's FMA preemption powers. First, a federal agency's view that its possession of preemptive power would advance federal policy is irrelevant to the issue of whether Congress authorized agency preemption. *See Louisiana*, 476 U.S. at 359, 374. Second, the Secretary has wisely refrained from invoking "dormant" foreign affairs powers as a basis for

preempting State and local tax laws. *See Medellin v. Texas*, 552 U.S. 491, 530-32 (2008) (absent Congressional authorization, Presidential Memorandum directing State courts to "set aside neutrally applicable state laws" is invalid exercise of President's foreign affairs authority).

This Court should grant *certiorari* to clarify that federal agencies cannot preempt State and local law unless Congress has clearly and manifestly expressed its intent to authorize agency preemption.

B. When Congress Does Not Clearly and Manifestly Express its Intent to Delegate Preemptive Powers to an Agency, the Agency's Interpretation of its Preemptive Powers Should Receive No Deference.

To determine whether Congress clearly and manifestly intended to authorize agency preemption, courts must consider the language, structure, purpose and history of the relevant federal statute. *See, e.g., Altria*, 555 U.S. at __, 129 S. Ct. at 543; *Louisiana*, 476 U.S. at 359.

When Congress clearly addresses an issue, courts "must give effect to the unambiguously expressed intent of Congress," without deferring to the agency's contrary views; "[t]he judiciary is the final authority on issues of statutory construction." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984). Even in the immigration context, where "judicial deference to the Executive Branch is especially appropriate" because immigration decisions implicate foreign relations, *INS v. Aguirre-Aguirre*, 526 U.S. 415,

425 (1999), this Court applies "traditional tools of statutory construction" to determine Congressional intent, rather than deferring to an agency's interpretation. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445-49 (1987); *see also Republic of Austria v. Altmann*, 541 U.S. 677, 701-702 (2004) (because determining reach of FSIA involves pure statutory construction, Secretary's interpretation "merit[s] no special deference").

If judicial construction "yield[s] no clear sense of congressional intent," then under "step two" of *Chevron*, courts often defer to an agency's reasonable interpretation of the statute it administers. *General Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004). Courts afford "substantial deference" to the agency's interpretation if Congress delegated authority to the agency to make rules carrying the force of law, and the agency promulgated its interpretation in the exercise of that authority. *Gonzales*, 546 U.S. at 255-56; *see also United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Otherwise, the agency's interpretation is "'entitled to respect' only to the extent it has the 'power to persuade.'" *Gonzales*, 546 U.S. at 256 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 [1944]).

Nevertheless, when an agency's preemptive power is at issue, courts should afford the agency's interpretation of its powers little, if any, deference. In such cases, judicial deference to the agency's interpretation would be inconsistent with the presumption against preemption: applying the presumption, the agency lacks power to preempt, whereas under *Chevron*, the agency's preemptive interpretation prevails.

Under such circumstances, the presumption should trump *Chevron*. *See Solid Waste*, 531 U.S. at 172-73 (2001) (reasoning that if statute were ambiguous as to whether Congress authorized agency to preempt traditional State powers, this Court would reject agency's view that statute authorizes preemption).

The presumption against preemption protects traditional State and local powers from unauthorized federal encroachment. Deferring to the agency's interpretation of its own preemptive powers would allow the agency to expand its authority beyond Congressionally intended limits. *See, e.g., Louisiana*, 476 U.S. at 374 ("An agency may not confer power upon itself."); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) (judicial deference to agency expertise cannot allow agency to assume "major policy decisions properly made by Congress"); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981) ("more intense scrutiny" appropriate when agencies interpret their own authority, because agencies "are likely to have an expansive view of their mission").

Moreover, a key rationale for *Chevron* deference – giving the court the benefit of the agency's expertise – is often absent when courts endeavor to determine whether a statute authorizes agency preemption. That pure question of statutory interpretation does not implicate an agency's substantive expertise. *See, e.g., Altmann*, 541 U.S. at 702 & n.23 (unlike Executive's "views on questions within its area of expertise," Executive's opinions regarding scope of federal statute "merit no special deference"); *New York v. FERC*, 535 U.S. 1, 18 (2002) (courts, rather than agencies, are

competent to determine whether Congress has authorized agency action); *cf. Palestine Information Office v. Shultz*, 853 F.2d 932, 936-39 (D.C. Cir. 1988) (affording deference to Secretary's FMA designation of Palestine Information Office as a foreign mission).

At best, if the agency has "no special authority to pronounce on pre-emption," its views on that topic should receive only *Skidmore* deference. *See Wyeth*, 129 S. Ct. at 1200-01 & n.9. Like the presumption itself (see pages 19-21 above), affording only *Skidmore* deference respects Congressional intent, checks agency power, and preserves State sovereignty. *See Watters*, 550 U.S. at 39, 41 (Stevens, J., dissenting); *Louisiana*, 476 U.S. at 374 ("An agency may not confer power upon itself.").

In *Watters*, Justice Stevens noted that this Court had never applied *Chevron* deference to an agency rule purporting to decide, without direct Congressional authority, the scope of federal preemption. *Watters*, 550 U.S. at 39, 41 (Stevens, J., dissenting). Nor has this Court done so since *Watters*. *See Cuomo v. Clearing House Ass'n*, __ U.S. __, 129 S. Ct. 2710, 2715, 2717 (2009) (rejecting agency's preemptive interpretation of statute); *Wyeth*, 129 S. Ct. at 1200-03 (affording *Skidmore* deference to agency's preemption views); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326 (2008) (Court's interpretation of statute's preemptive force rendered deference question academic); *Watters*, 550 U.S. at 20 (same).

This Court should grant *certiorari* to clarify that, contrary to the Court of Appeals' analysis, unless a federal statute clearly authorizes an agency to preempt

State and local law, the agency lacks power to do so, and the agency's contrary interpretation of the statute merits little or no deference.

II. THE SECRETARY'S NOTICE, WHICH PURPORTS TO CREATE AND CONFER PREEMPTIVE NEW PROPERTY TAX EXEMPTIONS FOR FOREIGN MISSIONS, IS INVALID.

A. The FMA Does Not Clearly and Manifestly Express Congressional Intent to Authorize the Secretary's Preemption of State and Local Tax Laws.

Nothing in the language or history of the FMA reveals Congress' intent – clear and manifest or otherwise – to authorize the Secretary to create, out of whole cloth, preemptive State tax law exemptions for foreign missions. To the contrary, Congress authorized the Secretary to preempt only local police powers, and to do so only "negatively," *i.e.*, by denying foreign missions property, goods, and services otherwise available under local law.

1. The FMA's "benefits" provisions do not allow the Secretary to create preemptive new tax exemptions for foreign missions.

The FMA defines "benefits" as the acquisition of (or authorization to acquire) existing items, such as real property, goods, and services, and grants the Secretary discretion to regulate foreign missions' access to those "benefits." 22 U.S.C. §§ 4302(a)(1), 4304(a-b). Aware that

foreign countries might impose imaginative new restrictions on U.S. embassies (*see, e.g.*, S. Rep. No. 97-283 at 2-3; H.R. Rep. No. 97-102 at 25-26; App. 27a-28a n.8), Congress further authorized the Secretary to regulate foreign missions' access to other items the Secretary "designated" as "benefits." 22 U.S.C. §§ 4302(a)(1), 4304(a-b); *see* H.R. Rep. No. 97-102 at 27-28 (FMA gives Secretary flexibility to "enforce reciprocity" and "make the punishment fit the crime"). In 1987, for example, the Secretary designated the acquisition of numerous goods and services, "[i]n addition to the benefits specifically enumerated in the [FMA]," as "benefits" to be acquired by Soviet Missions only through the State Department, or on the State Department's terms and conditions. 52 Fed. Reg. 5372 (Feb. 20, 1987).

Congress did not, however, authorize the Secretary to *create* new benefits, such as the tax exemption at issue here. The power to designate is the power to indicate, specify, or point out, not the power to create, bring into being, or cause to exist. Webster's New World College Dictionary 340, 391 (4th ed. 2001). *See, e.g.*, *Morgan v. Commissioner*, 309 U.S. 78, 80 (1940) ("State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed.").

If Congress had intended to grant the Secretary the power both to designate and *create* benefits, Congress would have done so. *See, e.g.*, 47 U.S.C. § 251(e) (directing FCC to "create or designate . . . entities to administer telecommunications numbering"). Congress does not normally use the word "designate"

to mean "create." *See, e.g.*, 8 U.S.C. § 1189(a)(1) (authorizing Secretary to "designate an organization as a foreign terrorist organization"); 31 U.S.C. § 5313(b) (authorizing Treasury Secretary to "designate a domestic financial institution" as federal government's agent for receipt of certain reports).

The legislative history of the FMA's benefits provisions (as well as of the FMA's preemption provision, discussed below) confirms that Congress granted the Secretary authority to regulate foreign missions' access to otherwise available "benefits," not the authority to invent preemptive "benefits" out of whole cloth. *See, e.g.*, House Report No. 97-693 (Conference Report, Aug. 3, 1982) (the "Conference Report" or "Conf. Rep.") at 39 (FMA "benefits" include "any type of service or supply . . . available from public or private sources"); H.R. Rep. No. 97-102 at 27 (FMA enables Secretary to review and regulate "the benefits available to [foreign missions] from Federal, State and local authorities, public utilities, and private persons"); S. Rep. No. 97-283 at 1 (same). The Secretary's Notice therefore purports to exercise a power Congress did not grant: to *create* a new local law tax exemption by "designat[ing] exemption from real property taxes . . . as a benefit for purposes of the [FMA]." 74 Fed. Reg. 31788; *see also* Brief for the United States as Amicus Curiae ("U.S. Amicus Br.") at 1, *City of New York v. Permanent Mission* (Nos. 08-1805 and 08-1806) (Secretary's Notice "created" the tax exemption). The Secretary cannot utilize the authority to *designate* benefits as a means of arrogating the power to *create* new benefits for foreign missions. *See, e.g.*, *Louisiana*, 476 U.S. at 374 ("An agency may not confer power upon itself.").

To support its contrary interpretation of the FMA, the Court of Appeals, like the United States, cited §§ 4303(2) and 4304(a), which authorize the Secretary to provide (or assist in the provision of) benefits to foreign missions, upon request and upon "such terms and conditions as the Secretary may approve" (App. 26a, 30a; U.S. Amicus Br. at 3-5, 9-10; Supplemental Brief for the United States as Amicus Curiae ["U.S. Supp. Br."] at 4-5, *City of New York v. Permanent Mission* [Nos. 08-1805 and 08-1806]). These FMA provisions do not encompass the authority to create new benefits. The Secretary may exercise the "provide or assist" power by authorizing foreign missions to acquire benefits regulated by the Secretary, *see* 22 U.S.C. § 4302(a)(1); providing customs and importation services to foreign missions, *see id.* § 4302(a)(1)(B); *Diplomatic Importation Program*, http://www.state.gov/ofm/customs; providing benefits to foreign missions as required under international law and treaties, *see* Conf. Rep. No. 97-696 at 43; or assisting foreign missions with the acquisition of existing benefits from federal, state, or local authorities. None of this requires, or contemplates, the creation of new benefits.

The Court of Appeals also adopted the United States' argument that FMA § 4304(b) somehow authorizes the Secretary to create and provide new benefits for foreign missions (App. 16a-17a, 23a; 74 Fed. Reg. 31788; U.S. Amicus Br. at 3-5, 9-10; U.S. Supp. Br. at 4-5). This is incorrect. Section 4304(b) prescribes factors for the Secretary to consider (*e.g.*, "to protect the interests of the United States") before "impos[ing] substantive and procedural constraints" on a foreign mission's access to benefits, Senate Report No. 97-329 (Committee on Governmental Affairs, Apr. 8, 1982) at 9, and says nothing about the creation of new benefits.

Even assuming the FMA authorized the Secretary to create new benefits, however, the Secretary had no authority to create the "benefit" of a local law tax exemption. In one sentence, the FMA defines "benefit" as a foreign mission's acquisition of (or authorization to acquire) enumerated real property, goods, and services, all of which are generally available to the public, and includes in the definition "such other benefits as the Secretary may designate." FMA § 4302(a)(1). Under the canons of *noscitur a sociis* and *ejusdem generis*, "'where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (citations omitted). *See, e.g.*, *Canton Police Benevolent Ass'n v. United States*, 844 F.2d 1231, 1236 (6th Cir. 1988) ("other benefits," in statute creating tax exemption for beneficiary associations that pay "life, sick, accident, or other benefits," is limited to "benefits" similar to life, sick, or accident benefits).

Invoking FMA § 4302(b), which commits "[d]eterminations with respect to the meaning . . . of the term[benefit]" to the Secretary's discretion, the Court of Appeals and the United States interpreted the phrase "other benefits" as encompassing a local law property tax exemption (App. 25a, 36a; U.S. Amicus Br. at 4-6; U.S. Supp. Br. at 2-4). Section 4302(b) is not, however, "a roving license to ignore the statutory text." *Massachusetts v. EPA*, 549 U.S. 497, 532-33 (2007). Interpreting "other benefits" broadly enough to encompass any conceivable item the Secretary deems

beneficial for foreign missions would grant the Secretary unrestricted freedom of choice, and render § 4302(a)(1)'s enumerated list of "benefits" meaningless. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (this Court avoids statutory interpretations which render some words redundant); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (foreign affairs statutes cannot "grant the Executive totally unrestricted freedom of choice").

Limiting FMA "benefits" to the broad category of generally-available real property, goods, and services reasonably constrains the Secretary's authority, while affording sufficient flexibility for the Secretary to carry out her FMA duties, and preserving State sovereignty.

2. The FMA's preemption provision does not allow the Secretary to preempt State and local property tax laws.

Dovetailing with the FMA's benefits provisions, FMA § 4307, entitled "Preemption," confirms that Congress never authorized the Secretary to preempt State and local real property tax laws.

"An express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to pre-empt other matters." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (same); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 415 (2d Cir. 2002) (quoting *Freightliner*). Consistent with the presumption against preemption, if a preemption provision "is susceptible of more than one plausible reading, courts ordinarily 'accept the

reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, __, 129 S. Ct. 538, 543 (2008) (citation omitted); *see also New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 123 (2d Cir. 2009) (same).

FMA § 4307 provides that "[n]othing in" §§ 4302 (definitions), 4303 (authorities of Secretary), 4304 (provision of benefits), or 4305 (property of foreign missions) preempts State or local law "regarding zoning, land use, health, safety, or welfare, except that a denial by the Secretary involving a foreign mission . . . shall be controlling."

This preemption provision, which does not mention local taxing powers, limits the Secretary's preemption authority: the Secretary may only preempt local police powers, and may do so only "negatively," by denying benefits to foreign missions. Nothing in § 4307 grants the Secretary power to preempt *any* laws "affirmatively," by creating and conferring benefits contrary to such laws. Thus, § 4307 does not authorize the Secretary to preempt State and local tax laws by creating and conferring an exemption. "'Mere silence . . . cannot suffice to establish a clear and manifest purpose to pre-empt local authority.'" *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 432 (2002) (citation omitted).

Consistent with its text, the legislative history of § 4307 clearly reveals Congress' intent to authorize only the "limited" and "negative" preemption power the Secretary sought – *i.e.*, the power to deny benefits otherwise available under local law, as opposed to the power to confer benefits otherwise *un*available under

local law. As explained by the Conference Report and Senate Report, *inter alia*, § 4307 "preclude[s] reliance on local law, regulation, or practice by a foreign mission in an effort to secure benefits contrary to limitations imposed by the Secretary." Conf. Rep. No. 97-693 at 43; S. Rep. No. 97-329 at 5, 16-17. "This is consistent with current practice[,]" the Conference Report states, "and reflects the policy of Federal preemption in foreign relations. *This subsection [4307] does not otherwise affect State or local law or regulations.*" Conf. Rep. No. 97-693 at 43 (emphasis added).

The Court of Appeals and the United States nevertheless construed § 4307 as shielding only the specified police powers from preemption, and implying an otherwise broad scope of preemptive power. Because § 4307 is silent with respect to taxing powers, the Court of Appeals, like the United States, inferred that Congress authorized the Secretary to preempt State and local tax laws (App. 31a-42a; U.S. Amicus Br. at 14-16; U.S. Supp. Br. at 7-8).

Such an expansive interpretation of § 4307 contravenes this Court's instructions for interpreting preemption provisions: accept reasonably narrow constructions, and do not infer clear and manifest preemptive intent from Congressional silence (see pages 31-32 above). If courts could presume a delegation of preemptive power from the absence of a statutory provision expressly withholding that power, "'agencies would enjoy virtually limitless hegemony.'" *American Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005) (citation omitted).

Thus, nothing in the FMA reveals the clear and manifest intent of Congress – or indeed any intent of

Congress – to authorize the Secretary's creation of preemptive new State and local tax law exemptions. The Secretary's creation and conferral of new local law tax exemptions, not otherwise available to foreign missions from any source, far exceeds the regulatory powers Congress envisioned.

B. Departing from Precedent, the Court of Appeals Erroneously Held that the FMA Allows the Secretary to Preempt State and Local Tax Laws.

The Court of Appeals erroneously rejected the presumption against preemption, improperly deferred to the Secretary's interpretation of her preemptive authority, and deemed the Notice valid.

In rejecting the presumption, the Court of Appeals relied upon *New York v. FERC*, 535 U.S. 1, 18 (2002) (App. 35a). Although this Court declined to apply the presumption in *FERC*, Congress there had "unambiguously authorize[d]" the Federal Energy Regulatory Commission to regulate interstate transmissions of electricity, and the case "d[id] not concern the validity of a conflicting state law or regulation." 535 U.S. at 19-20. Thus, nothing in *FERC* required the Court of Appeals to abandon the presumption against preemption here.

Having improperly rejected the presumption against preemption, the Court of Appeals further erred by reversing the presumption, and interpreting every relevant FMA provision in *favor* of preemption (App. 16a-17a; 21a-26a; 33a-38a).

The Court of Appeals' misapplication of the presumption was particularly egregious because the Secretary, acting without the authority of any international law or treaty, purported to preempt traditional State taxing powers that Congress itself had previously declined to preempt on behalf of international organizations (see pages 20-21 above). Even if local taxation of consular and mission staff housing has become an "irritant" in bilateral relations, *see* 74 Fed. Reg. 31788, the Secretary cannot respond by issuing an informal Notice purporting to destroy municipal tax liens and taxing powers.

The Court of Appeals also erred by affording substantial, *Chevron*-type, deference to the Secretary's expansive interpretation of her FMA preemption powers (App. 19a-42a). Apart from the Secretary's lack of expertise in the field of statutory interpretation (see pages 24-25 above), the Secretary urged an unreasonable interpretation of the FMA (see pages 29-31 above), and advanced that interpretation in an informal Notice, promulgated without notice and a period for comment, which lacked the force of law (see page 8 above).[2] *See, e.g.*, *Wyeth v. Levine*, __ U.S. __, 129 S. Ct. 1187, 1201 (2009) (affording no deference to agency's preemptive views expressed in regulatory preamble issued without notice and period for comment); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)

2. Petitioner recently sued the Secretary for failing to respond to Petitioner's year-old FOIA request for documents underlying the Secretary's assertion that local taxation of staff housing harms foreign relations. *See* Complaint, *City of New York v. United States Department of State*, 10-cv-7876 (S.D.N.Y. Oct. 15, 2010).

(affording no deference to agency statutory interpretation advanced in opinion letter, which lacks force of law).

At most, the Court of Appeals should have evaluated the Secretary's views on preemption within the *Skidmore* framework (see pages 23-25 above). Applying the *Skidmore* factors of thoroughness, consistency, and persuasiveness, *see Wyeth*, 129 S. Ct. at 1201, the Secretary's views were entitled to zero deference.

First, the Secretary's asserted preemption of State and local tax laws contradicts assurances an Assistant Secretary of State made to Congress in 1982, during hearings on the FMA, that the State Department only sought, and the FMA only provided for, "negative" preemption. *See* Conf. Rep. No. 97-693 at 43; S. Rep. No. 97-329 at 5, 16-17. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155-57 (2000) (FDA's assertion of jurisdiction to regulate tobacco products at odds with FDA's repeated assurance to Congress that it lacked such jurisdiction).

Second, the Notice is inconsistent with the Secretary's Foreign Affairs Manual, which explicitly states that consular and mission staff housing is taxable, and with the Secretary's own diplomatic notes (including one specifically related to India's mission property) to the same effect (2 U.S. Department of State *Foreign Affairs Manual* § 271.1, http://www.state.gov/documents/organization/84391.pdf [last accessed October 22, 2010]; IA132, 136-37; MA77, 81-82; App. 57a-58a n.19). *See Watt v. Alaska*, 451 U.S. 259, 273 (1981) (agency's "current interpretation, being in conflict with its initial position, is entitled to considerably less deference").

Moreover, the Notice's purported elimination of Petitioner's tax claims against Respondents is inconsistent with: (1) Congressional appropriations acts contemplating judicial resolution of claims against foreign governments for unpaid real estate taxes (see pages 7-8 above); (2) the FSIA, which Congress enacted to remove the Secretary from foreign sovereign immunity determinations (see page 10 above); and (3) this Court's decision in *Permanent Mission*, 551 U.S. 193, which rejected the Secretary's FSIA immunity argument, and remanded this case for judicial resolution on the merits.

Nor should the Court of Appeals have afforded any deference to the Secretary's claim that taxation of mission staff housing "has become a major irritant in the United States' bilateral relations." 74 Fed. Reg. 31788. As explained above (at pages 21-22), that claim is irrelevant to the question of whether the FMA authorizes the Secretary to preempt local law.

Finally, even though FMA § 4312 requires the Secretary to exercise her authority in compliance with presidential procedures and guidelines, nothing in the Notice reflects consideration of President Obama's May 2009 Memorandum reminding agencies to undertake preemption "only with full consideration of the legitimate prerogatives of the States." 74 Fed. Reg. 24693 (May 22, 2009).

Rather than deferring to the Secretary's unreasonably expansive view of her preemptive powers under the FMA, the Court of Appeals should have reminded the Secretary that if federal agencies seek

authority to preempt State and local tax laws, they must obtain it from Congress.

III. THE COURT OF APPEALS APPLIED AN UNPRECEDENTED AND ERRONEOUS TEST TO HOLD THAT THE SECRETARY MAY ISSUE RETROACTIVE RULES.

The Court of Appeals acknowledged that the Secretary's Notice "create[s] a retroactive rule" (App. 43a-44a). That Court also conceded that "the FMA does not contain . . . express authorization for the State Department to issue a [retroactive] rule" (App. 62a).

Under this Court's precedent, these concessions end the analysis: an agency cannot promulgate retroactive rules without express Congressional authority. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also INS v. St. Cyr*, 533 U.S. 289, 316 (2001) ("Cases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation.") (citation omitted); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (applying presumption that retroactive operation of statute requires "clear congressional intent favoring such a result").

Having conceded the Secretary's lack of express authority from Congress to promulgate retroactive rules, the Court of Appeals purported to expand the reach of *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), a jurisdictional case concerning the applicability of the FSIA to past conduct. In *Altmann*, this Court did not require a clear statement of Congress' intent,

instead considering the overall purpose of the FSIA and scrutinizing it for any sign of retroactive intent. 541 U.S. at 692-700.

Altmann presented a narrow ruling. 541 U.S. at 700. This Court subsequently explained that *Altmann* deviated from the clear statement requirement only because it was analyzing a jurisdictional statute in the unique context of foreign sovereign immunity. *See, e.g., Republic of Iraq v. Beaty*, __ U.S. __, 129 S. Ct. 2183, 2194 (2009) (under *Altmann*, laws merely altering the rules of foreign sovereign immunity are not operating retroactively when applied to pending cases); *Hamdan v. Rumsfeld*, 548 U.S. 557, 576 (2006) (no presumption against retroactivity in *Altmann* because it construed a jurisdictional statute that did not modify substantive rights); *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 38 n.6 (2006) (*Altmann*'s avoidance of *Landgraf* turned on peculiarities of the FSIA).

But even if it were appropriate to ignore the clear statement requirement and apply *Altmann* here, the Court of Appeals did so incorrectly. As in its preemption analysis (App. 23a), the Court of Appeals erroneously found in 22 U.S.C. § 4304(b) a grant of authority "to provide benefits . . . if such action is 'reasonably necessary . . . to assist in resolving a dispute affecting United States interests and involving a foreign mission or sending state'" (App. 62a-63a). Section 4304(b) only authorizes the Secretary to resolve disputes by *restricting* or conditioning otherwise available benefits, not by creating or providing new benefits.

The Court of Appeals also engaged in an unprecedented analysis of the City's expectations and reliance (App. 49a-61a). Under *Landgraf*, expectations

and reliance are relevant to determining whether a rule in fact has a retroactive effect, not to whether an agency has authority to promulgate retroactive rules. 511 U.S. at 269-70.

An agency has authority to promulgate retroactive rules only if it has express Congressional authorization to do so; the strength of a plaintiff's expectations is irrelevant at that stage of the analysis. Because Congress did not clearly authorize the Secretary to promulgate retroactive rules, the Notice lacks retroactive force.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED AUGUST 17, 2010

Docket Nos. 08-1805-cv, 08-1806-cv
(consolidated for disposition)

THE CITY OF NEW YORK,

Plaintiff-Appellee,

— v. —

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, Defendant-Appellant, Great America Leasing Corporation, Jane Doe #1 through Jane Doe # 20, the names of the last 20 defendants being unknown to the plaintiff, the persons or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint,

Defendants.

THE CITY OF NEW YORK,

Plaintiff-Appellee,

— v. —

THE BAYARYN JARGALSAIKHAN, as principal resident representative to the United Nations of the Mongolian People's Republic,

Defendant-Appellant.

JUDGES: Before: CALABRESI, HALL, Circuit Judges, SESSIONS,[1] District Judge.

OPINION BY: CALABRESI

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1. The Honorable William K. Sessions III, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

Appendix A

OPINION

CALABRESI, *Circuit Judge*:

These consolidated appeals arise from a long-standing tax dispute between the City of New York ("the City") and certain foreign sovereigns who operate missions to the United Nations in the City. For years, the City has assessed property taxes against these missions, maintaining that while those parts of embassy buildings that are used for diplomatic offices are exempt from property taxation under international and state law, other parts of the buildings— those that are used as residences for employees and their families—are not exempt. Appellants, the Permanent Mission of India to the United Nations (the "India Mission") and the Principal Resident Representative of the Mongolian People's Republic to the United Nations (the "Mongolia Mission")—collectively "the Missions"—have resisted paying any property taxes to the City. They contend that their entire embassy buildings are tax exempt.

This dispute, and the litigation it engendered, ultimately prompted the United States Department of State ("Department of State" or "State Department") to act. In June 2009, the State Department issued a notice pursuant to its authority under the Foreign Missions Act, *22 U.S.C. § 4301 et seq.*, establishing an exemption from real property taxes on property owned by foreign governments and used to house the staff of permanent missions to the United Nations or the Organization of American States or of consular posts.

Appendix A

See Designation and Determination under the Foreign Missions Act (the "State Department Notice" or the "Notice"), *74 Fed. Reg. 31,788 (July 2, 2009)*. The Notice stated that this exemption would preempt inconsistent State and local laws and also that it would apply retroactively to taxes that had been previously assessed against the designated property. *Id.* We are now called upon to determine whether the action taken by the State Department was within its statutory authority. We conclude that it was. Specifically, we hold that the Foreign Missions Act ("FMA") permits the State Department to designate affirmative benefits such as tax exemptions and that the Act allows the State Department to make such tax exemptions preemptive of State and municipal tax laws. We also hold that, under the circumstances of this case, the State Department acted within its power in designating this benefit as effective retroactively. Finally, we conclude that the Notice issued by the State Department was procedurally proper because it falls within the "foreign affairs function" exception to notice and comment under the Administrative Procedure Act, *5 U.S.C. § 553(a)(1)*.

BACKGROUND

I.

The India Mission is housed in a twenty-six story building, located at 235 East 43rd Street, New York, N.Y., and owned by the government of the Republic of India. The first six floors of the building, as well as the basement and the cellar, are used for diplomatic offices.

The remaining floors are dedicated to rent-free residential space for security personnel, a driver, and the diplomats of the Mission and of India's consulate in New York (the offices of which are located elsewhere in the City). All of these employees rank below the head of the Mission, whose residence is not on site. The Mongolian Mission is housed in a multi-story building at 6 East 77th Street in New York City that is owned by the People's Republic of Mongolia. The first two floors are used for the Mission's offices. The third floor is used for the Ambassador's apartment. The top two floors are used as rent-free apartments for other employees of the Mission.

The City has consistently taken the position that mission property used for the residences of lower-level employees is subject to taxation, and it has been levying taxes on such properties for years. Both the India Mission and the Mongolia Mission have argued that these residences are exempt from taxation under international and New York law because the residences are used for the purposes of the mission/consulate. They have therefore refused to pay any property taxes to the City. By operation of New York law, the unpaid taxes converted into tax liens held by the City against the relevant properties.

II.

A.

In April 2003, the City filed separate complaints against several foreign missions in New York state

court.[2] Pursuant to *28 U.S.C. § 1441(d)*, the Missions removed the cases to the United States District Court for the Southern District of New York. In its amended complaints, the City sought judgments for unpaid property taxes (and other unpaid charges) plus interest. The City also sought declaratory judgments to establish the validity of its tax liens against these missions. After limited jurisdictional discovery, the India Mission and the Mongolia Mission moved to dismiss, contending that, pursuant to the Foreign Sovereign Immunity Act ("FSIA"), *28 U.S.C. § 1604*, the District Court lacked subject matter jurisdiction. The District Court denied the motion. It concluded that under the FSIA's "immovable-property" exception—which provides that "[a] foreign state shall not be immune from jurisdiction . . . in any case . . . in which rights in . . . immovable property situated in the United States are in issue," *28 U.S.C. § 1605(a)(4)*—the court had jurisdiction to adjudicate the validity of the City's tax liens. *See City*

2. In addition to bringing suit against Appellants, the City sued the Republic of Turkey ("Turkey") and the Republic of the Philippines ("the Philippines"). Turkey subsequently settled with the City for $6 million. *See City of N.Y. v. Permanent Mission of India to the U.N.*, *446 F.3d 365, 367 n.2 (2d Cir. 2006)*. The suit against the Philippines was consolidated with the suits against the India Mission and the Mongolia Mission. The District Court found that parts of the building owned by the Philippines were taxable, but that others were not. The parties initially filed an appeal and cross-appeal respectively, but those appeals were withdrawn with prejudice after the parties reached a settlement in January 2009. *See Sewell Chan, Philippines to Pay $ 9 Million in Property Taxes and Interest*, N.Y. Times, Jan. 30, 2009, at A24.

(Cont'd)

of N.Y. v. Permanent Mission of India to the U.N. ("Permanent Mission I"), 376 F. Supp. 2d 429, 439 (S.D.N.Y. 2005).

The Missions filed an interlocutory appeal that was limited exclusively to the jurisdictional issue. We affirmed the judgment of the District Court, holding that the immovable property exception to foreign sovereign immunity provided jurisdiction over the matter because what was in dispute was "the extent of defendants' obligations under local law (here, property taxes) arising directly out of ownership of real property in the United States." *See City of N.Y. v. Permanent Mission of India to the U.N., 446 F.3d 365, 376 (2d Cir. 2006).* The Supreme Court granted certiorari, *549 U.S. 1177, 127 S. Ct. 1144, 166 L. Ed. 2d 910,* and affirmed. *Permanent Mission of India to the U.N. v. City of N.Y., 551 U.S. 193, 127 S. Ct. 2352, 168 L. Ed. 2d 85 (2007).*

B.

The cases were then remanded to the District Court for proceedings on the merits. The parties cross-moved for summary judgment on the question of whether the parts of the properties used by India and Mongolia to house their staff were subject to real estate taxation. The District Court held that they were. *See City of N.Y. v. Permanent Mission of India to the U.N.*

(Cont'd)

Because these missions are not parties to this appeal, all subsequent references to "the Missions" refer exclusively to the India Mission and the Mongolia Mission.

("Permanent Mission II"), 533 F. Supp. 2d 457, 460 (S.D.N.Y. 2008).

The District Court first addressed the Missions' claimed tax exemption under the applicable Vienna Conventions: a) Article 32 of the Vienna Convention on Consular Relations, ("VCCR"), Apr. 24, 1963, 21 U.S.T. 77, (ratified 1969), for the portions of the premises that house consular staff and b) Article 23 of the Vienna Convention on Diplomatic Relations ("VCDR"), Apr. 18, 1961, 23 U.S.T. 3227, (ratified 1972), for the portions of the premises that house the U.N. Missions. Under the VCCR,

> [c]onsular premises and the residence of the career head of consular post of which the sending State or any person acting on its behalf is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.

VCCR art. 32. "[C]onsular premises" are defined in the VCCR as "the buildings or parts of buildings and the land ancillary thereto . . . used exclusively for the purposes of the consular post." *Id.* art. 1(j). As the District Court explained, the VCDR "reaches the same result as the VCCR but through a slightly more circuitous route." *Permanent Mission II, 533 F Supp.*

2d at 461. Article 1 of the VCDR defines "premises of the mission"[3] to comprise:

> the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.

VCDR art. 1(i). Article 23, in turn, provides:

> The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.

VCDR art. 23.

The District Court held that "the plain language of the VCCR and the VCDR unequivocally supports the City's position" that the portions of the missions used to house employees and their families are not tax exempt. *Permanent Mission II, 533 F. Supp. 2d at 461*. The Court reasoned that both the VCCR and VCDR limited tax exemptions to the actual office space of the consular or mission premises and to the residence of

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3. A "mission," in turn, "consists of a group of people sent by one state to another; it does not refer to the premises which they occupy in the receiving state." *United States v. Kostadinov, 734 F.2d 905, 908 (2d Cir. 1984)*.

the head of the mission or consular post. The District Court observed that the VCCR "distinguishes for tax purposes between 'consular premises' and 'residence,'" which led the Court to conclude that the provision "limits the tax exemption respecting residence to 'the residence of the career head of consular post' and none other." *Id. at 460-61.* Similarly, with respect to the VCDR, the District Court found that the two provisions quoted above, "when taken together, make plain that the residential exemption from taxes is limited to 'residence of the head of the mission,' and not to others." *Id. at 461.*

The District Court then rejected the Missions' remaining arguments, including their contention that disputed portions of the missions were exempt from taxation under customary international law.[4] *See id. at 461-62.* Accordingly, the District Court granted the City's motion for summary judgment, thereby validating its tax liens and its assessment of taxes with interest against India and Mongolia. *See id. at 470.* The Court asked the parties to submit letters regarding the

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4. As to the Philippines, the District Court also considered and rejected the argument—now asserted on appeal by Appellants—that its property was tax exempt under *section 418* of the New York Real Property Tax Law. *See Permanent Mission II, 533 F. Supp. 2d at 466.* This New York statute exempts from taxation real property owned by a foreign government that is "used exclusively for the purposes of maintaining offices or quarters" for that country's "principal resident representative" or for "offices for the staff of such representatives." *N.Y. Real Prop. Tax Law § 418.*

amounts due to the City. In a subsequent order, the District Court rejected all of the Missions' objections to the City's calculations, including their general objection that the interest rates imposed by the City were "exorbitant." *See City of N.Y. v. Permanent Mission of India to the U.N. ("Permanent Mission III"), 538 F. Supp. 2d 701, 703 (S.D.N.Y. 2008)*. Judgment was therefore entered against the India Mission in the amount of $ 42,451,769.35 and against the Mongolia Mission in the amount of $ 4,395,003.13. *Id. at 704*.[5] Both the India Mission and the Mongolia Mission filed notices of appeal.

III.

On June 23, 2009, while this appeal was pending, the Department of State issued a notice entitled *Designation and Determination under the Foreign Missions Act, 74 Fed. Reg. 31,788*. Invoking its authority under the FMA, the State Department "designate[d] [an] exemption from real property taxes on property

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5. The India Mission was charged interest at a rate of 18% from the period beginning in 1991 to the entry of judgment in 2008. The Mongolia Mission was charged the same interest rate for this time-period. For taxes dating from 1980 to 1990, the interest rate varied from 15% to 25.5%.

On the consent of the parties, these amounts included interest calculated through February 25, 2008. All interest thereafter was to be calculated on basis of federal post-judgment rates. *See Permanent Mission III, 538 F. Supp. 2d at 704*.

owned by foreign governments and used to house staff of permanent missions to the United Nations or the Organization of American States or of consular posts as a benefit for purposes of the Foreign Missions Act." *Id.* (emphasis added). The Notice further explained that the exemption "shall be provided to such foreign missions on such terms and conditions as may be approved by the Office of Foreign Missions and that *any state or local laws to the contrary are hereby preempted.*" *Id.* (emphasis added).

The Notice stated that the action taken was "in accord with the tax treatment of foreign government-owned property in the United States used as residences for staff of bilateral diplomatic missions and conforms to the general practice abroad of exempting government-owned property used for bilateral or multilateral diplomatic and consular mission housing." *Id.* (citation omitted). The State Department explained its action as follows:

> This action is necessary to facilitate relations between the United States and foreign states, to protect the interests of the United States, to allow for a more cost effective approach to obtaining benefits for U.S. missions abroad, and to assist in resolving a dispute affecting U.S. interests and involving foreign governments which assert that international law requires the exemption from taxation of such diplomatic and consular properties. The dispute has become a major irritant in the

> United States' bilateral relations and threatens to cost the United States hundreds of millions of dollars in reciprocal taxation. As the largest foreign-government property owner overseas, the United States benefits financially much more than other countries from an international practice exempting staff residences from real property taxes, and it stands to lose the most if the practice is undermined. Responsive measures taken against the United States because of the dispute also have impeded significantly the State Department's ability to implement urgent and congressionally mandated security improvements to our Nation's diplomatic and consular facilities abroad, imposing unacceptable risks to the personnel working in those facilities. This action will allow the United States to press forward with improvements that will protect those who represent the Nation's interests abroad.

Id.

The State Department explicitly addressed the Notice's intended retroactive effect, asserting that the

> exemption from real property taxes provided by this designation and determination shall apply to taxes that have been or will be assessed against any foreign government with respect to property subject to this

> determination, *and shall operate to nullify any existing tax liens with respect to such property*, but shall not operate to require refund of any taxes previously paid by any foreign government regarding such property.

Id. (emphasis added). Finally, the State Department indicated that the actions taken in the Notice "are not exclusive and are independent of alternative legal grounds that support . . . tax exemption." *Id.*

We granted the Government's motion to submit out of time an *amicus* brief formally apprising the Court of the Notice and discussing its legal implications. We then gave the parties an opportunity to respond, and allowed the Government to file a supplemental *amicus* brief to reply to the City's arguments.[6]

The two cases were argued together, and we have now consolidated them for disposition.

DISCUSSION

The State Department Notice squarely applies to the tax dispute at issue in this case. The Notice (1) provides that, as a benefit under the FMA, "property owned by foreign governments and used *to house staff*

6. The Government has not taken a position, either in its briefs or at oral argument, on any of the other legal issues raised by these appeals, including the proper interpretation of the VCCR and the VCDR.

of permanent missions . . . or of consular posts" is exempt from real property taxation; (2) states that "any state or local laws to the contrary," such as those of New York City, are preempted; and (3) expressly states that the tax exemption is to apply retroactively to taxes that have previously been assessed and "shall operate to nullify any existing tax liens" with respect to the affected property. *74 Fed. Reg. 31,788* (emphasis added). Therefore, if the State Department's issuance of the Notice was procedurally proper, and if the actions taken in the Notice are within the Secretary's lawful authority under the FMA, then the Notice is dispositive of this case and requires that we find in favor of the Missions irrespective of whether the Missions are also entitled to immunity from taxation under either international or state law.

After outlining the relevant provisions of the FMA, we address the issue of whether the Notice establishing the tax exemption as a "benefit" is lawful as applied prospectively. We then consider whether it was within the State Department's authority to designate such a benefit to be effective retroactively. Finally, we address whether the Notice was procedurally proper, given that it was promulgated without notice and comment.

I.

The FMA was enacted in 1982 to "support the secure and efficient operation of United States missions abroad, to facilitate the secure and efficient operation in the United States of foreign missions . . ., and to assist

in obtaining appropriate benefits, privileges, and immunities for those missions and organizations and to require their observance of corresponding obligations in accordance with international law." *22 U.S.C. § 4301(b)*. The Act's legislative history indicates that Congress was troubled by the fact that "an increasing number of countries" denied United States missions suitable locations or long-term rights to property or facilities, resulting in increased costs and diminished security and effectiveness. *See* S. Rep. No. 97-283, at 2 (1981). The Act was designed to address this "serious and growing imbalance between the treatment accorded in many countries to official missions of the United States [] and that made available to foreign government missions in the United States." *Id.* at 1. Congress sought to accomplish this by creating "a statutory scheme that vests broad discretion in the Secretary of State to exercise authority over foreign missions in light of [relevant] foreign policy considerations and concerns." *Republic of Benin v. Mezei, 483 F. Supp. 2d 312, 320 (S.D.N.Y. 2007)*. To this end, the Act specifies that the "treatment to be accorded to a foreign mission in the United States shall be determined by the Secretary [of State] after due consideration of the benefits, privileges, and immunities provided to missions of the United States in the country or territory represented by that foreign mission. . . ." *22 U.S.C. § 4301(c)*.

The term "benefit"—whose meaning is central to the State Department's Notice and the City's challenge to it—is defined under *section 4302(a)* to mean:

> any acquisition, or authorization for an acquisition, in the United States by or for a foreign mission, including the acquisition of—(A) real property . . ., (B) public services . . ., (C) supplies, maintenance, and transportation, (D) locally engaged staff . . ., (E) travel and related services, (F) protective services, and (G) financial and currency exchange services, and includes *such other benefits as the Secretary may designate.*

§ 4302(a)(1) (emphasis added). *Section 4302(b)* directs that determinations "with respect to the meaning and applicability" of terms listed in *section 4302(a)*—including "benefit"—are "committed to the discretion of the Secretary." The legislative history indicates that this provision was included to "avoid conflicting interpretations by different government agencies and courts and potential litigation that might detract from the efficient implementation of [the FMA] or might adversely affect the management of foreign affairs." S. Rep. No. 97-283, at 7 (1981).

Section 4303 specifies the functions to be carried out by the Secretary. They include, *inter alia*, "[a]ssist[ing] agencies of Federal, State, and municipal government with regard to ascertaining and according benefits, privileges, and immunities to which a foreign mission may be entitled,"[7] and "[p]rovid[ing] or

7. "Privileges and immunities" refer to international law obligations the United States owes to foreign missions. Such obligations exist irrespective of the Secretary's "benefit" designations. *See 22 U.S.C. § 4310.*

assist[ing] in the provision of benefits for or on behalf of a foreign mission in accordance with *section 4304* of [the Act]." *22 U.S.C. § 4303(1)-(2). Section 4304* governs the "[p]rovision of benefits." Pursuant to it, the Secretary may provide benefits, subject to any terms and conditions that she specifies, either "[u]pon the request of a foreign mission," *§ 4304(a)*, or when the Secretary "determines that such action is reasonably necessary on the basis of reciprocity or otherwise" to help meet certain foreign policy goals including:

> (1) to facilitate relations between the United States and a sending State, (2) to protect the interests of the United States, (3) to adjust for costs and procedures of obtaining benefits for missions of the United States abroad, (4) to assist in resolving a dispute affecting United States interests and involving a foreign mission or sending State, or (5) . . . to implement an exchange of property between the Government of the United States and the government of a foreign country . . . .

Id. at *§ 4304(b)(1)-(5)*. If the Secretary determines that action is necessary, then she "may require a foreign mission (A) to obtain benefits from or through the Secretary on such terms and conditions as the Secretary may approve, or (B) to forego the acceptance, use, or relation of any benefit or to comply with such terms and conditions as the Secretary may determine . . . ." *Id.* at *§ 4304(b)*.

Appendix A

The FMA includes a section that addresses preemption. That section provides in full:

> Notwithstanding any other law, no act of any Federal agency shall be effective to confer or deny any benefit with respect to any foreign mission contrary to this chapter. Nothing in *section 4302*, *4303*, *4304*, or *4305* [addressing the property of foreign missions] of this title may be construed to preempt any State or municipal law or governmental authority *regarding zoning, land use, health, safety, or welfare*, except that a *denial* by the Secretary involving a benefit for a foreign mission within the jurisdiction of a particular State or local government shall be controlling.

Id. at *§ 4307* (emphasis added).

Section 4308 sets forth general provisions for the regulation of foreign missions. Relevant among them, *section 4308(a)* provides the Secretary with the authority to issue regulations to carry out the policy of the FMA, and *section 4308(g)* establishes that "[e]xcept as otherwise provided, any determination required under [the FMA] shall be committed to the discretion of the Secretary."

II.

A.

When Congress expressly confers to an agency interpretive authority over a statute that the agency is administering, our review of the agency's interpretation is limited and deferential. *See United States v. Mead Corp., 533 U.S. 218, 226-27, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001)*; *McNamee v. Dep't of the Treasury, 488 F.3d 100, 105 (2d Cir. 2007)*. We give a policy determination made by an agency pursuant to its explicitly delegated authority "controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 324, 114 S. Ct. 835, 127 L. Ed. 2d 152 (1994)* (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*). Our deference is especially substantial with respect to the State Department's administration of its delegated responsibilities under the FMA because the Act deals with an area "bound up with security concerns and issues of reciprocity among nations." *Sheridan Kalorama Historical Ass'n v. Christopher, 49 F.3d 750, 756, 311 U.S. App. D.C. 16 (D.C. Cir. 1995)*. We recognize that the State Department is best positioned a) to assess the impact laws and policies like the City's have on the effective functioning of foreign missions in the United States, and b) to consider the collateral consequences those laws and policies will have on the interests of the United States missions abroad.

Limited review does not, however, mean no review. Though the FMA vests interpretive discretion in the Secretary over certain terms like "benefit," it remains incumbent upon us as a court to determine whether the Notice exceeds the State Department's statutory authority. *See Schweiker v. Gray Panthers, 453 U.S. 34, 44, 101 S. Ct. 2633, 69 L. Ed. 2d 460 (1981)* (indicating that courts do "not abdicate review" in the context of an express delegation of substantive authority, but instead follow the limited task of ensuring that the Secretary did not exceed her delegated authority or issue a regulation that is arbitrary or capricious); *Palestine Info. Office v. Shultz, 853 F.2d 932, 934, 272 U.S. App. D.C. 1 (D.C. Cir. 1988)* (explaining that judicial review of executive action under the FMA is "confined to determining that the Secretary acted in conformity with the provisions of the [statute]").

B.

The first question we must answer, therefore, is whether the FMA authorizes the State Department to designate property tax exemptions for mission and consular staff residences as "benefits." The Government, whose position Appellants adopt, argues that the Notice falls within the expansive authority granted in the FMA to the State Department. The City argues that it does not, and contends that exemptions from generally applicable local laws, including tax laws, are not within the permissible scope of the statutory term "benefit." The City maintains that "benefit" is used in a technical, narrow, and somewhat counter-intuitive sense in the

FMA. According to the City, the FMA authorizes the State Department to designate goods and services as benefits only for the purpose of imposing reciprocal *restrictions*, and not for the purpose of "award[ing] favors to foreign missions by relieving them of their local law obligations." Appellee Resp. Br. to Amicus Curiae 20. On this view, benefits are limited to acquisitions of existing real property, and other goods, and services that are readily available to the general public. The City argues that when the State Department designates such items as "benefits" for a foreign mission, the action serves as a potential sanction because the designation gives the State Department authority, under *section 4304*, to impose restrictions on otherwise freely-available items as a way to reciprocate for restrictions imposed on United States missions abroad. The City bases its argument on the text and structure of the FMA, as well as on the asserted broader purpose of the legislation, which according to the City is embodied both in the statute's legislative history and in the manner in which it has subsequently been implemented by the State Department.

1.

We begin our interpretation of a federal statute with the statutory text. *See United States v. Hasan, 586 F.3d 161, 166 (2d Cir. 2009). Section 4302(a)* defines "benefit" as follows: It first provides that "benefit" means "any acquisition, or authorization for an acquisition," of a variety of thereafter enumerated goods and services. *22 U.S.C. § 4302(a)(1)(A)-(G)*. Then, in a phrase set-off

from aforementioned list of examples, it states that "benefit" also "includes such other benefits as the Secretary may designate," *id. § 4302(a)(1)*. The State Department relies on the second part of this definition for the authority to designate as a benefit the tax exemption for mission and consular residences.

We agree that the broad and open-ended language of the second part of this definition empowers the State Department to grant positive benefits, such as property tax exemptions. Nothing in *22 U.S.C. § 4302(a)(1)* limits the category of "other benefits" in the second part of the definition to the enumerated list of "acquisition[s]" in the first-part. To the contrary, the illustrations used in the definition are explicitly non-exclusive, and the second part of the definition is best read as authorizing the State Department to designate additional benefits that are consistent with the FMA's general purposes. Such a delegation is unexceptional in a statute that confers discretionary authority to an executive department to manage foreign affairs. *See Zemel v. Rusk, 381 U.S. 1, 17, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965)* ("Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas."). And though this delegation is broad, it is not unguided. *Section 4301(c)*, for instance, directs that the treatment of a foreign mission "shall be determined . . . after due consideration of the benefits, privileges, and immunities provided to missions of the United States in the country or territory represented by that foreign mission, as well as matters relating to

the protection of the interests of the United States." In addition, *section 4304* sets forth the grounds on which the Secretary should rely in deciding whether to provide benefits and whether to set terms and conditions on their use. Indeed, in the Notice, the State Department expressly referenced the statutory objectives identified in *sections 4301* and *4304* of the FMA as the basis for its benefit designation. *See 74 Fed. Reg. 31,788* ("This action is necessary to facilitate relations between the United States and foreign states, to protect the interests of the United States, to allow for a more cost effective approach to obtaining benefits for U.S. missions abroad, and to assist in resolving a dispute affecting U.S. interests and involving foreign governments which assert that international law requires the exemption from taxation of such diplomatic and consular properties.").

In an attempt to resist this understanding of "benefit," the City invokes the principle of *ejusdem generis*. *Ejusdem generis* is a textual canon of statutory interpretation that instructs courts to interpret a general term in a statute that follows a list of more specific terms "to embrace only objects of the same kind or class as the specific ones." *United States v. Amato, 540 F.3d 153, 160 (2d Cir. 2008)*. The City acknowledges, as it must, that the first part of the definition of "benefit" in *section 4302(a)(1)(A)-(G)* is illustrative rather than exhaustive, but it urges that the illustration serves to restrict the scope of the second part of the definition that gives the Secretary authority to designate "other benefits." According to the City, the common category

established by the list in *section 4302(a)(1)(A)-(G)*, consists of "acquisitions of existing real property, goods, and services" that are "readily available to the public for lawful acquisition." Appellee Resp. Br. to Amicus Curiae 27. This restriction of the general term "other benefits" to "items readily available to the public for lawful acquisition" fits with the City's view of the FMA as authorizing the State Department to designate benefits exclusively for the purpose of imposing sanctions by restricting access to generally-available items. It also necessarily would exclude tax exemptions from the permissible scope of the term because exemptions, by definition, are not generally available to the public, and their recognition as a benefit is a favor to foreign missions, not a sanction.

We find the City's textual argument unconvincing. The principle of *ejusdem generis* is "no more than an aid to construction" that "comes into play only when there is some uncertainty as to the meaning of a particular clause in a statute." *See United States v. Turkette, 452 U.S. 576, 581, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981)*. It does not "warrant confining the operations of a statute within narrower limits than were intended." *United States v. Kennedy, 233 F.3d 157, 161 n.4 (2d Cir. 2000)* (internal quotation marks omitted). Adopting the City's argument would have precisely the effect of imposing limitations on statutory language that is purposefully broad. The dictionary definition of "benefit"—"something that . . . promotes well-being" or a "useful aid," *Webster's Third New International Dictionary of the English Language Unabridged* 204

(1992) —is much more expansive than the City's formulation. Statutory language, of course, "has meaning only in context," *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 130 S. Ct. 1396, 1404, 176 L. Ed. 2d 225 (2010)* (internal quotation marks omitted), and so it is possible that Congress may use a general word in a sense that is more technical and limited than its standard definition, *see E. Norman Peterson Marital Trust v. C.I.R., 78 F.3d 795, 796-97 (2d Cir. 1996)*. But there is no contextual basis for adopting a narrower than normal meaning here. And we are especially reluctant to use the principle of *ejusdem generis* to narrow the interpretation of "benefit" under the FMA. For doing so would risk reading judicial limits into a term Congress seems deliberately to have sought to leave open-ended in order to give the State Department flexibility in an area where flexibility is particularly desirable. To the extent that some uncertainty about the scope of the term benefit exists, we are, therefore, guided first and foremost by the FMA's allocation of interpretive authority rather than by textual canons. *See 22 U.S.C. § 4302(b)* ("Determinations with respect to the meaning and applicability of the term[] [benefit] shall be committed to the discretion of the Secretary.").

Moreover, and even apart from considerations of deference, we doubt that *ejusdem generis* is relevant to this particular statutory provision. As we previously explained, we read the "other benefits" part of the definition for "benefits" as structurally separate from the enumeration in *§ 4302(a)(1)(A)-(G)*. It follows that

we do not regard "other benefits" as a general term that necessarily embraces the same object as the specific benefits identified; the second part of the definition is a delegation, not merely a "catch-all." *See Turkette, 452 U.S. at 582* (explaining that where a statutory provision establishes two separate categories, and the second category does not itself contain a specific enumeration followed by a general description, "*ejusdem generis* has no bearing on the meaning to be attributed to" the second category). This conclusion is reinforced when we consider the category to which the City seeks to limit the term "benefits." While the specifically enumerated benefits in *section 4302(a)(1)(A)-(G)* all plausibly fit within the category of generally-available items to which the State Department may restrict access in order to impose sanctions, the FMA as a whole manifestly also contemplates benefits that do not fit within this limitation. *Section 4303*, for example, declares that the Secretary shall "*[p]rovide or assist in the provision of benefits* for or on behalf of a foreign mission in accordance with *section 4304*." *22 U.S.C. § 4303(2)* (emphasis added). And the City fails to explain why the FMA would use words like "[p]rovide" and "assist" if benefits are confined to generally available items upon which the Secretary may only place restrictions or conditions. Additionally, *section 4304(a)* of the Act permits the Secretary to provide benefits to or for a foreign mission, "[u]pon the request of [that] foreign mission." If a benefit is always a generally available item, the designation of which is meant to be used as a sanction, it is hard to understand why a foreign mission might *request* benefits.

2.

We next consider the City's argument that the FMA's purpose and history indicate that Congress intended to establish a limited and technical meaning of "benefit" that the Notice in this case contravened.

A review of the legislative history of the FMA suggests that the City correctly characterizes the primary mischief that Congress intended to address in the statute: the imposition of restrictions and burdens on U.S. missions overseas and the State Department's inability to respond with targeted and proportionate measures. Congress documented several examples of what it considered unfair treatment by foreign governments that impaired the ability of U.S. missions to purchase property abroad and to obtain facilities and services.[8] Congress also recognized that, at the time,

8. The Senate Report for the Committee on Foreign Relations offered several examples, including (1) that in the Soviet Union and Eastern European countries, the United States was not permitted to purchase office and residential properties or even basic administrative support and services such as housing maintenance, utilities, or tickets for cultural events, and was instead required to obtain these items through government controlled organizations at a substantial surcharge, (2) that in several countries including Venezuela, Kuwait, Bahrain, the United Arab Emirates, and Indonesia, various restrictions were placed on the State Department's ability to purchase or own housing, (3) that in countries such as Mexico, Venezuela, Singapore, and Guatemala, inequitable restrictions were placed on the import and export of the private vehicles and other personal effects of diplomats, and (4) that inequitable

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the State Department did not have the legal tools to respond to such treatment because it "lack[ed] authority to impose similar restrictions or conditions on . . . other countries in the United States" and was instead forced, if it was to act at all, to "take far more extreme action such as barring the country from using property . . . or declaring some persons persona non grata." S. Rep. No. 97-283, at 3 (1981). These extreme remedies were not generally "suitable," Congress explained, and so they were "rarely used." *Id.* By contrast, the FMA provided "mechanisms whereby the operations of foreign missions in the United States and the benefits available to them from Federal, State and local authorities, public utilities, and private persons may be cleared through the Federal Government and adjusted according to United States needs" so that "the conditions under which foreign missions operate in the United States can be made to reflect the conditions under which missions of the United States are required to operate in the countries represented by such foreign missions." *Id.* at 1-2. In other words, the FMA allowed the State Department

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taxes on goods and services such as gasoline, heating oil, and construction materials were imposed in several countries including in Chile, Malta, and Portugal. S. Rep. No. 97-283, at 2-3 (1981). The House Report for the Committee on Foreign Affairs specifically singled out "[t]he problem of taxation of diplomatic personnel" as "particularly vexing," observing that "many host governments" failed to live up to their obligations under international agreements, such as the VCDR and VCCR, creating "considerable extra expense to Foreign Service members." H.R. Rep. No. 97-102, Pt. 1, at 26 (1981).

"to make the punishment fit the crime." H.R Rep. No. 97-102, Pt. 1, at 27 (1981) (internal quotation marks omitted).

We reject, however, the City's invitation to treat evidence that Congress passed the FMA in part to create a reciprocal-sanctions regime as proof that Congress intended to limit the State Department's authority to designate benefits to this function only. First, we find no evidence that Congress sought to proscribe the State Department from using benefits as "carrots" rather than as "sticks" in instances where the State Department believed that doing so would best advance the national interest and improve treatment for United Sates missions abroad. The State Department made just such a judgment in this case. The Notice a) describes how the tax treatment foreign missions have received in the United States has led to adverse "[r]esponsive measures taken against the United States" and b) explains why, if the United States were to pursue reciprocal retaliation rather than confer a positive benefit, it would likely leave the United States worse off. *See 74 Fed. Reg. 31,788* ("As the largest foreign-government property owner overseas, the United States benefits financially much more than other countries from an international practice exempting staff residences from real property taxes, and it stands to lose the most if the practice is undermined."). Of course, just because a certain diplomatic tool is desirable does not mean that Congress has authorized it. But in the context of a statute in which Congress has "expressed a clear intention that the executive branch's authority . . . be broad," *Palestine*

Info. Office, 853 F.2d at 938, and in which Congress gave interpretive authority to the State Department to "avoid conflicting interpretations by . . . courts," S. Rep. No. 97-283, at 7 (1981), it would be improper to read Congress's focus on the use of benefits as restrictions to exclude, implicitly, such other perfectly ordinary uses of "benefits."

Second, the legislative history suggests that in addition to providing the State Department with new authority to respond to the treatment of United States missions abroad, the FMA also had the purpose of giving the State Department the ability "to assist foreign missions, at their request, to obtain benefits" in order to "enhance the ability of foreign missions to conduct their representational duties in the United States." S. Rep. No. 97-283, at 8 (1981); *accord* H.R. Rep. No. 97-102, Part 1, at 31 (1981). This additional purpose, which is reflected in the statute's statement of policy in *section 4301(b)*, clearly contemplates the granting of affirmative benefits by the State Department.

Apart from the legislative history, the City also seeks to rely on the FMA's post-enactment regulatory history as providing support for its interpretation. The City contends that while the State Department has previously used the FMA to impose restrictions on specific foreign missions by placing conditions on their acquisition of property, goods or services, the Department has not historically attempted to use its authority under domestic law to grant legal exemptions. The fact that the FMA can be used (and indeed has been used) to

impose reciprocal sanctions does not, however, limit the State Department's authority to designate benefits in other ways that are also consistent with the statute. And in the context of a statute that was designed to facilitate flexibility, we do not believe that the supposed novelty of this benefit designation makes such a designation suspect.[9]

We therefore conclude that the FMA empowers the State Department to grant positive benefits, as well as to place restrictions on existing benefits.

C.

That the State Department is authorized to confer tax exemptions as "benefits" to foreign missions does not necessarily mean, however, that such benefits preempt State and local tax laws. Accordingly, we turn now to the question of the preemptive effect of the State Department Notice. A federal agency "may preempt state regulation and hence render unenforceable state

9. The FMA has been used to designate a tax exemption in at least one other instance. In a notice issued in January 2009, the State Department designated an exemption from Federal and State or local excise taxes imposed with respect to tobacco products for foreign diplomatic and consular missions and personnel. *See Designation of Benefits Under the Foreign Missions Act; Diplomatic and Consular Exemption from Tobacco Excise Taxes*, 74 Fed. Reg. 5019 (Jan. 28, 2009). The Government represents to us that this notice reaffirmed a designation made in 1998, though there is no indication in the 2009 notice that this is so.

or local laws that are otherwise not inconsistent with federal law" provided the agency is "acting within the scope of its congressionally delegated authority." *New York v. FCC*, *486 U.S. 57, 63-64, 108 S. Ct. 1637, 100 L. Ed. 2d 48 (1988)* (internal quotation marks omitted); *see also SPGGC, LLC v. Blumenthal*, *505 F.3d 183, 188 (2d Cir. 2007)* ("Federal regulations have no less preemptive effect than federal statutes." (quoting *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, *458 U.S. 141, 153, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982)*)). But "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, *476 U.S. 355, 374, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986)*. In determining whether the Notice preempts the City's property tax laws, we must therefore answer two questions: (1) whether the action taken by the State Department in the Notice was intended to preempt the City's property tax laws, and if so (2) whether the State Department acted within the scope of its delegated authority in preempting those laws. *See Drake v. Lab Corp. of Am. Holdings*, *458 F.3d 48, 56 (2d Cir. 2006)*.

The answer to the first question is not in doubt: The State Department expressly addressed the preemptive effect of the Notice, and provided that "any state or local laws to the contrary [of the Notice's benefit designation] are hereby preempted." *74 Fed. Reg. 31,788*. And even aside from that explicit assertion, it is clear that the City's property taxes cannot coexist with the State Department's Notice, and so, if the latter is valid, it must

prevail. *See Blum v. Bacon*, 457 U.S. 132, 145-46, 102 S. Ct. 2355, 72 L. Ed. 2d 728 (1982); *see also Wyeth v. Levine*, 129 S. Ct. 1187, 1200-01, 173 L. Ed. 2d 51 (2009) (recognizing that an agency regulation with the force of law can preempt conflicting state requirements when the court determines that there is a conflict).

We also answer the second question in the affirmative. The State Department acted within its statutory authority in recognizing a property tax exemption as a benefit that has the effect of preempting the City's inconsistent tax laws. In reaching this conclusion, we reject the City's contention that *section 4307*—which provides that nothing in the FMA "may be construed to preempt any State or municipal law or governmental authority *regarding zoning, land use, health, safety, or welfare*, except that a denial by the Secretary involving a benefit for a foreign mission within the jurisdiction of a particular State or local government shall be controlling," *22 U.S.C. § 4307*—precludes the State Department from granting a benefit that affirmatively displaces State or local tax laws. The problem with the City's argument is apparent from the text of *section 4307* emphasized above. *Section 4307* does not bar the State Department from providing benefits that contravene *all* local laws. Rather, by its terms it specifically shields only those State or local laws "regarding zoning, land use, health, safety, or welfare." The section is tellingly silent with regard to State and local tax laws.

Attempting to resist this textual implication, the City argues that the section implicitly forbids any preemption that it does not explicitly authorize. That is, according to the City, the provision allows the State Department to exercise "negative preemption"[10] by issuing "controlling" denials of benefits that trump contrary zoning, land use, health, safety, or welfare laws that would normally make such benefits available, *22 U.S.C. § 4307*, but it does not otherwise allow the State Department to displace State or local law. The City's argument for this interpretation relies primarily on its view of the legislative history of *section 4307*, as well as on background norms of interpretation that establish a presumption against preemption when Congress authorizes regulatory action in an area that the States have traditionally occupied, *see Altria Group, Inc. v. Good, 129 S. Ct. 538, 543, 172 L. Ed. 2d 398 (2008)*.

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10. The City draws this term from the FMA's legislative history. *See infra* at 38a-41a. The term is meant to express the idea that the State Department could tell cities and states what *not* to do with respect to certain matters (*e.g.* instructing a city not to allow a mission to relocate at a certain location) but could not impose affirmative obligations on the city or state in those areas (e.g. by requiring a city to allow a foreign mission to locate in a certain location in contravention of that city's zoning laws). The term "negative preemption" has been used for different and entirely distinct purposes by other courts. *See, e.g., Fellner v. Tri-Union Seafoods, LLC, 539 F.3d 237, 247 n.6 (3d Cir. 2008)* (describing preemption of state law through deliberate federal inaction as "negative preemption").

With respect to the presumption against preemption, we can readily assume the existence of such a presumption. But we do not believe it affects the issues disputed in this case. As the Supreme Court has explained, the presumption against preemption is relevant to assessing "whether a given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority." *New York v. FERC, 535 U.S. 1, 17-18, 122 S. Ct. 1012, 152 L. Ed. 2d 47 (2002)*. The presumption also operates when there is doubt about whether Congress intended to provide an agency with the authority to preempt. *See N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 123 (2d Cir. 2009)* ("[W]here the text of a preemption clause is ambiguous . . ., courts 'have a duty to accept the reading that disfavors pre-emption.'") (quoting *Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005)*). But neither matter is in doubt here; there is no question that the City's property tax law conflicts with the State Department Notice and that the State Department intends to supersede that tax law. Instead, the dispute is about whether the State Department acted lawfully by seeking to preempt State and municipal tax law. Resolving this question requires us to determine whether the State Department acted within the scope of its congressionally delegated authority, and that is a matter of statutory interpretation that proceeds, in the absence of ambiguity, "without any presumption one way or the other." *New York, 535 U.S. at 18*. It is to this inquiry that we now turn.

Appendix A

The language, structure, and subject-matter of the FMA all strongly indicate that Congress meant to give the State Department authority to designate benefits that might conflict with and therefore preempt State and local law. *See La. Pub. Serv. Comm'n*, *476 U.S. at 374* ("[T]he best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency."). As we have already explained, the FMA's delegation of authority to the State Department is exceptionally broad. The Secretary of State is given the power not only to designate benefits, *22 U.S.C. § 4302(a)*, but also to make "[d]eterminations with respect to the meaning and applicability" of that term, *id. § 4302(b)*. More generally, the Act specifies that "[e]xcept as otherwise provided, *any* determination required under [the FMA] shall be committed to the discretion of the Secretary." *Id. § 4308(g)* (emphasis added). Furthermore, these allocations are made in the context of foreign affairs, "the precise realm in which the Constitution accords [the executive branch] greatest power," *Palestine Info. Office*, *853 F.2d at 934*, and which is also an area in which there is often a need for the Nation to speak with one voice, *see Am. Ins. Assoc. v. Garamendi*, *539 U.S. 396, 413-14, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003)*.

The "plenitude of Executive authority," given to the Secretary of State to regulate foreign missions under the FMA controls the question of whether the State Department acted permissibly in designating a tax exemption benefit that preempted inconsistent State

and local tax law. *See Crosby v. National Foreign Trade Council*, *530 U.S. 363, 365, 376, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000)* (concluding that the fullness of Presidential authority delegated by Congress to impose calibrated sanctions and use economic leverage against a foreign country "controll[ed] the issue of preemption"). By granting the State Department the power to implement an expansive statutory term—"benefit"—and by providing the Department with significant discretionary authorities designed to achieve a foreign affairs objective, the FMA authorizes the Department to take actions that preempt conflicting State or local laws that implicate the Department's supervisory function over foreign missions. *Cf. id.* ("It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action."). The FMA authorizes preemption, that is, unless, as the City argues, *section 4307* constitutes statutory language to the contrary.

But, understood in context, *section 4307* supports, rather than detracts from, our conclusion that the State Department acted within the scope of its statutory authority. That section demonstrates that Congress recognized that the State Department might wish to designate benefits that contravened State or local law, and that Congress chose to limit the State Department's authority over some of these laws, namely State or local *police powers*, to negative preemption only. The City's

argument to the contrary notwithstanding, *section 4307* cannot in its natural meaning be read as describing the FMA's full-preemptive scope, but rather as a savings cause that insulates certain listed State and municipal powers from preemption. As such, *section 4307* provides additional support for the conclusion that the State Department has the power to preempt any and all State and local laws that are not specifically protected. *See Drake, 458 F.3d at 62* ("[A] narrow saving clause may in some contexts support an inference that preemption is otherwise broad . . . .").

The legislative history of *section 4307* of the FMA, which the City recounts at length, if anything gives further backing to this interpretation. While the legislative history confirms that Congress was concerned about preemption under the FMA and attempted to balance carefully the diplomatic interests of the federal government against the interests of State and local governments, it in no ways suggests that Congress intended for *section 4307* to impose limits on the State Department's ability to designate tax exemptions with preemptive effect.

The original Senate and House bills contained a different preemption provision from the one that was ultimately enacted into law as *section 4307*. It read:

> Notwithstanding any other provision of law, no act . . . of any State or municipal government authority shall be effective to confer or deny any benefits with respect to any foreign mission contrary to this title.

S. 854, 97th Cong. § 207, *reproduced in* S. Rep. No. 97-329, at 32 (1981); H.R. 3518, 97th Cong. § 207, *reproduced in* H.R. Rep. No. 97-102, Pt. 1, at 62 (1981). According to the reports of both the House and Senate Committees on Foreign Affairs, this provision "declare[d] the preemptive effect of the exercise of Federal jurisdiction with regard to the conferring or denying of benefits (including the location or use of real property) which are regulated by this title." S. Rep. No. 97-283, at 15 (1981); H.R. Rep. No. 97-102, Part 1, at 36 (1981). The breadth of this preemption provision drew opposition, much of which was directed at the possibility that the FMA might conflict with local zoning laws and with home rule for the District of Columbia (which was implicated by section 206—codified at *22 U.S.C. § 4306*—addressing the location of foreign missions in Washington D.C., as well as by the more general provisions regarding benefits).

The State Department tried to address these concerns. The Assistant Secretary of State for Administration sent a letter to the Senate discussing the preemptive scope of *section 207* and what effect it would have on "state or municipal land use processes, in connection with regulation of the location and size of the foreign missions." *See* Letter from Thomas M. Tracy, Assistant Sec'y of State for Admin., to William V. Roth, Chairman, Governmental Affairs Comm., U.S. Senate (Mar. 4, 1982), *reproduced* in S. Rep. No. 97-329, at 5 (1981). The letter explained that such state and local authorities were "not affected, with the exception that the Secretary . . . may disqualify a foreign government

from obtaining or retaining official facilities in any location in the United States." *Id.* The Governmental Affairs Committee Report acknowledged that some members were concerned because Mr. Tracy's interpretation—which the Committee understood to describe a "'negative veto'"—was not then reflected in the text of the bill, but the majority of the committee ultimately shared Mr. Tracy's view that the statute did not interfere with or preempt local zoning and regulatory policies. *See* S. Rep. No. 97-329, at 16-17 (1981). On the issue of Washington D.C. home rule, the Committee acknowledged that *section 206* did allow for the preemption and alteration of zoning and land use regulations, but concluded that in other respects "District of Columbia laws and ordinances, including *tax* and penal codes, [could not] be preempted by th[e] legislation." *Id.* at 17 (emphasis added).

Some in the Committee were not mollified. Five senators recorded their "minority views" and "object[ed] to the broad federal preemption language of *sec. 207* of the bill." *Id.* at 42 (minority views). They believed that "the effect of this provision would be to override not only [laws in the] District of Columbia, but also other municipalities' and states' laws concerning such things as zoning for consulates; building . . . codes . . .; *tax codes*; police powers and penal codes." *Id.* (emphasis added). The senators feared that if the Secretary, in her discretion, determined to "confer or deny any of the kinds of 'benefits'" under the FMA, those benefits would be conferred or denied "regardless of the requirements of local or state law." *Id.* The senators argued that such

a "sweeping preemption of federal, state, and local law" was not necessary to accomplish diplomatic reciprocity and was not required by the terms or intent of the VCDR. *Id.* They also rejected the Assistant Secretary's assurance "that a negative preemption was all that was intended" because they concluded that *section 207* was "not so narrowly drawn." *Id.* at 43. The senators reported that these concerns about state and local autonomy were shared by "the National League of Cities, the U.S. Conference of Mayors, and several State Attorneys General." *Id.*[11]

In the end, *section 207* was amended at conference to its present form. Under it, the reference to State or municipal laws being preempted was altered so that, as to "any State or municipal law or governmental authority regarding zoning, land use, health, safety, or welfare," only negative preemption was permitted. *22 U.S.C. § 4307.*

We recognize that the minority views of the Report for the Senate Governmental Affairs Committee demonstrate that there were some members of Congress who did not wish to give the State Department the authority to do what it has done in the Notice:

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11. Another Senator, David Durenberger, appended his own views to the Report. He indicated general support for the bill but expressed concern about the "overreaching effects of *Section 207*" and the possibility that it would undermine decisions by local zoning boards. *See* S. Rep. No. 97-329, at 53 (1981) (additional views of Sen. Durenberger).

override State and municipal tax laws. *See* S. Rep. No. 97-329, at 42 (1981) (minority views). It is also possible to read the majority report of that Committee as reflecting a view that—before the statutory language was altered—the FMA did not actually provide the State Department with this power. *See id.* at 17. But when *section 4307* was changed to its present form, the modified provision stated that preemption of areas like zoning and land use was limited to the exercise of a negative veto, and significantly said nothing whatever about tax laws. This silence is conspicuous. Where the record indicates that there were concerns within Congress that the FMA would empower the State Department to preempt affirmatively a variety of State and local laws *including tax laws*, we cannot read a statutory modification that limited the State Department's ability to preempt affirmatively *some* of those laws—not including tax laws—as implicitly barring affirmative preemption of other local laws, and specifically tax laws.[12]

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12. There is one phrase in the Conference Report of the FMA discussing *section 4307* as modified that could be read to support the City's position. In the middle of various statements regarding this provision, there appears the following:

> Should a State or local governmental entity wish to deny benefits which it is not obliged to grant, contrary to a determination by the Secretary of State that such benefits should be granted, the matter would, as under present practice, be subject to resolution through discussions between the Department of State and the State or local governmental entity.

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III.

Having concluded that the State Department's decision to create an exemption from all property taxes (including State and local taxes) for property owned by foreign governments and used to house staff of permanent missions and consular officers was within the Department's authority under the FMA, we now consider whether the Notice also invalidates taxes previously assessed by the City and nullifies the City's tax liens. Once again, our inquiry involves two questions: (1) Does the language of the Notice require that it be given retroactive effect? And if so, (2) has Congress provided the State Department with statutory authority to exempt missions from taxation retroactively? *See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-09, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988)*; *Rock of Ages Corp. v. Sec'y. of Labor, 170 F.3d 148, 158 (2d Cir. 1999)*.

The language of the Notice clearly resolves the first question. The Notice states: "The exemption from real property taxes provided by this designation and determination shall apply to taxes that *have been* or will be assessed against any foreign government with

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H.R. Rep. No. 97-693, at 43 (1982) (Conf. Rep.). But in context, it is clear that the Report was referencing benefit determinations relating to enumerated police powers—such as the authorization for a mission's location that the State Department cannot compel a State or municipality to accept under *section 4307*. As to these benefit designations, discussions in lieu of preemption were appropriate.

respect to property subject to this determination, and shall operate to nullify any existing tax liens with respect to such property . . . ." *74 Fed. Reg. 31,788* (emphasis added).[13] And there can be no doubt that what the State Department has done is to create a retroactive rule because it "attaches a new disability" to prior tax assessments made by the City in the form of invalidation through federal preemption. *See Landgraf v. USI Film Prods., 511 U.S. 244, 269, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)* (explaining that laws "which take[] away or impair[] vested rights acquired under existing laws, or create[] a new obligation, impose[] a new duty, or attach[] a new disability, in respect to transactions or considerations already past, must be deemed retrospective" (internal quotation marks omitted)).

We therefore turn to whether the State Department had the statutory authority to confer such a retroactive property tax exemption.

A.

"Retroactivity is not favored in the law." *Sweet v. Sheahan, 235 F.3d 80, 89 (2d Cir. 2000)* (quoting *Bowen, 488 U.S. at 208*). Courts, accordingly, have regularly employed a presumption against retroactivity as a default rule for statutory interpretation. *See Landgraf,*

13. The Notice does not, however, require a refund of taxes previously paid. *See 74 Fed. Reg. 31,788* ("The exemption . . . shall not operate to require refund of any taxes previously paid by any foreign government regarding such property.").

511 U.S. at 272-73. As applied to rulemaking by executive agencies and departments, this presumption against retroactivity means that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen, 488 U.S. at 208*; *accord Rock of Ages Corp., 170 F.3d at 158*.[14] "Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." *Bowen, 488 U.S. at 208-09*.

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14. Our cases considering whether agencies have been delegated the authority to promulgate rules with retroactive effect have generally relied on the same presumption against retroactivity that has been recognized for statutory interpretation. *See, e.g., Rock of Ages Corp., 170 F.3d at 158*. Indeed, in *Bowen*, the Supreme Court referenced the general presumption against retroactivity for the interpretation of congressional enactments and legislative rules, and then added that "[b]y the same principle" statutory grants of legislative rule making authority should not ordinarily be interpreted to include the power to issue retroactive rules. *488 U.S. at 208*.

Beyond this general presumption, some circuits have interpreted the APA to impose an additional bar to retroactive rulemaking, because of the APA's definition of a "rule" to mean "an agency statement of general or particular applicability and *future effect*," *5 U.S.C. § 551(4)* (emphasis added). *See, e.g., Celtronix Telemetry, Inc. v. FCC, 272 F.3d 585, 588, 348 U.S. App. D.C. 183 (D.C. Cir. 2001)*; *National Medical Enterprises, Inc. v. Sullivan, 957 F.2d 664, 671 (9th Cir. 1992)*; *see also Bowen, 488 U.S. at 216, 224* (Scalia, J., concurring) (arguing that the plain meaning of the APA's definition for "rule" precludes an agency

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The Government argues that the presumption against retroactivity is not relevant to this case because the Notice involves Executive action in the foreign affairs context and because it implicates only public, rather than private, rights. For this proposition, it relies by analogy on *Republic of Austria v. Altmann, 541 U.S. 677, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004)*, where the Supreme Court declined to apply an antiretroactivity presumption to the FSIA, and held that the FSIA standards for sovereign immunity apply to claims based on conduct predating the FSIA's enactment. *See id. at 696-97*; *see also Republic of Iraq v. Beaty, 129 S. Ct. 2183, 2194, 173 L. Ed. 2d 1193 (2009)* (finding the presumption against retroactivity inapplicable to an appropriations act that authorized the President to waive the application of the FSIA's state sponsor of terrorism exception to Iraq).

To the extent the Government contends that the presumption against retroactivity is always inapplicable

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from adopting rules that have a primary retroactive effect in the sense of changing what the law was in the past without "some special congressional authorization").

Our court has left open the question of whether and when a rule promulgated pursuant to the APA is permitted to be retroactive. *See NLRB v. Long Island Coll. Hosp., 20 F.3d 76, 81 n.6 (2d Cir. 1994)*. In the case before us, neither the parties nor the Government has briefed the question of whether the APA establishes an obstacle to retroactive rule making that is independent of the *Landgraf/Bowen* presumption. We therefore do not consider the argument properly raised and decline to consider it here. *See T. Co. Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 346 n.10 (2d Cir. 2010)*.

to cases involving public rights in the foreign affairs context, it over-reads *Altmann*. The Government highlights the statement in *Altmann* that though the antiretroactivity presumption is "not strictly confined to cases involving private rights, it is most helpful in that context." *541 U.S. at 696*. As we discuss below, that recognition by the Court offers an important insight into the relations between the substantive values underlying the antiretroactivity presumption and the presumption's application. But the statement does not suggest that the presumption against retroactivity is generally inapplicable when only public rights are implicated. The law has long been to the contrary, and *Altmann* cannot be read to abrogate those decisions *sub silentio*. *See Landgraf, 511 U.S. at 271 n.25* ("While the great majority of [Supreme Court] decisions relying upon the antiretroactivity presumption have involved . . . burden[s on] private parties, [the Supreme Court] ha[s] applied the presumption in cases involving new monetary obligations that fell only on the government."); *United States v. Magnolia Petroleum Co., 276 U.S. 160, 162-63, 48 S. Ct. 236, 72 L. Ed. 509, 66 Ct. Cl. 763, 1928-1 C.B. 287, T.D. 4153 (1928)* (applying the presumption against retroactive legislation to conclude that the taxpayer was not entitled to the benefit of an intervening statute that established a more taxpayer-favorable rule for calculating tax refunds owed by the federal government); *Yale-New Haven Hosp. v. Leavitt, 470 F.3d 71, 87 n.16 (2d Cir. 2006)* (applying the presumption against retroactivity to a Medicare regulation because the regulation would impose new obligations on the Secretary of Health and Human Services with respect

to a completed transaction, and finding it "immaterial" that the new payment obligation would fall on the Government rather than on a private party). Indeed, the holding in *Altmann* is explicitly limited to the "*sui generis* context" of the FSIA. *541 U.S. at 696.*

The Government also has no support for the suggestion that the presumption is inapplicable because foreign affairs are implicated. Though, in *Altmann*, the issue of sovereign immunity obviously arose in the foreign affairs context, this was not the basis for the Court's holding in that case. Instead, the *Altmann* decision relied on the nature of sovereign immunity laws, which are quasi-jurisdictional in nature and are not designed to encourage primary conduct on the part of the immune sovereign or to provide a basis for reliance interests. *See id.* ("[T]he principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some present protection from the inconvenience of suit as a gesture of comity." (emphasis and internal quotation marks omitted)).[15]

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15. The Executive's ability to resolve, in some circumstances, pending claims brought against foreign sovereigns pursuant to Executive Agreements, *see, e.g., Dames & Moore v. Regan, 453 U.S. 654, 686, 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981)*, also does not undermine the existence of the

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Nevertheless, we do find *Altmann* instructive. It reminds us that "the antiretroactivity presumption is just that—a presumption, rather than a constitutional command."[16] *541 U.S. at 692-93.* And it demonstrates that the force of the presumption depends on the values that underlie it and the degree to which such values are at issue.

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antiretroactivity presumption as applied to foreign affairs as a general matter. Judicial acceptance of the Executive's power to settle the claims of its nationals against foreign countries by Executive Agreement in order to resolve a major foreign policy dispute does not mean courts will presume that the Executive Department may retroactively abrogate legal obligations foreign governments owe to public or private entities in this country. *See Dames & Moore, 453 U.S. at 688* (underscoring "the narrowness" of the Court's decision, and cautioning that the Court did "not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities"). The President's authority to enter Executive Agreements to settle civil claims between American citizens and foreign governments or foreign nationals is predicated on a "history of congressional acquiescence" to these agreements that is treated as a "gloss on Executive Power." *See Medellin v. Texas, 552 U.S. 491, 531-32, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008)* (emphasizing that this Executive authority is "narrow and strictly limited") (internal quotation marks omitted in text).

16. Except of course for when the rule *reflects* a specific constitutional command. *See Landgraf, 511 U.S. at 266-67* (discussing these Constitutional provisions that impose antiretroactivity principles such as the *Ex Post Fact* Clause, the *Fifth Amendment's* Takings Clause, and the prohibitions on "Bills of Attainder" in Art. I, §§ 9-10).

Retroactive laws are not always pernicious. They may "serve entirely benign and legitimate purposes," such as responding to emergencies, correcting mistakes, preventing attempts to undermine the transition to new legal rules, or simply giving comprehensive effect to a desirable policy change. *Landgraf, 511 U.S. at 267-68.* But retroactive lawmaking (whether by legislation or regulation) typically risks unfairness. *See Eastern Enters. v. Apfel, 524 U.S. 498, 533, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998).* Retroactive laws can be used for "retribution against unpopular groups or individuals." *INS v. St. Cyr, 533 U.S. 289, 315, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)* (quoting *Landgraf 511 U.S. at 266*); *accord Doe v. Pataki, 120 F.3d 1263, 1273 (2d Cir. 1997).* They frequently upset settled expectations by imposing burdens and disabilities with respect to completed transactions and actions. *See Altmann, 541 U.S. at 696*; *Landgraf, 511 U.S. at 270*; *General Motors Corp. v. Romein, 503 U.S. 181, 191, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992).* And they may undermine rule-of-law values that enable people to know what the law is, and to have confidence about the legal consequences of their actions. *See Landgraf, 511 U.S. at 265-66.* A default rule that requires Congress to make a clear statement when it wishes legislation to have retroactive effect—or when it wishes to empower an agency to issue retroactive rules—helps to minimize these risks by assuring "that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id. at 272-73.* This requirement also fosters political accountability, by "allocat[ing] to Congress

responsibility for fundamental policy judgments concerning the proper temporal reach of statutes." *Id. at 273.*

In view of the values the presumption against retroactivity is designed to serve, it is not surprising that it has most frequently been applied in cases involving contractual or property rights, where "predictability and stability are of prime importance," *id. at 271 & n.25*, and especially to cases involving private rights, where it is particularly undesirable—unfair even—to undermine good-faith reliance on established legal rules, *see Altmann, 541 U.S. at 696.* But where the evils of retroactivity are not present, the strength of the antiretroactivity presumption may be correspondingly diminished both because the presumption is less likely to reflect the intent of a reasonable legislator and because it is not needed to promote Congressional accountability. *Cf. Landgraf, 511 U.S. at 272-73.* In such circumstances, it may become necessary for a court to look to the statute as a whole and to determine, even in the absence of a clear statement, whether Congress meant the statute to have retroactive effect, or, in the case of a delegation, whether Congress intended to have the statute authorize retroactive executive rulemaking. Thus, in *Altmann*, the Court declined to rely on the absence of a clear statement in the FSIA and applied the FSIA to pre-enactment conduct. It did so after recognizing that retroactive application of the statute would not a) affect private rights, or b) upset significant reliance interests (because sovereign immunity laws are not meant to

create reliance). *See 541 U.S. at 696.* We find similar considerations relevant in the instant case, and these lead us to conclude that the FMA gave the State Department the power to confer a retroactive tax exemption to foreign missions.

First, the State Department Notice implicates only the public rights of States and municipalities, not of private persons. We have explained that under our case law, this fact is not independently sufficient to negate the antiretroactivity presumption. *See Yale-New Haven Hosp., 470 F.3d at 87 n.16.* But when it is combined with other factors that suggest that the typical costs of retroactivity are not at stake, it is germane. The City is not a politically weak actor. And while there is perhaps some unfairness to the City when the federal government retroactively declares property taxes imposed by the City against foreign countries to be null and void, this unfairness inheres in the federal government's unquestioned supremacy in the management of foreign relations. *Cf. United States v. Cnty. of Arlington, Va., 702 F.2d 485, 488 (4th Cir. 1983)* ("Maintenance of friendly relations with foreign powers transcends in importance municipal taxation. The County must yield in the interests of us all, itself included . . . ."). In other words, this is manifestly not a case where retroactive lawmaking is being used to burden an unpopular or underrepresented person, group, or entity.

Second, and most important, the Notice does not upset expectations that were genuinely settled. It is true

that this suit, which was brought to establish the validity of the City's tax liens, involves "rights in . . . property," *see Permanent Mission of India to the United Nations*, *551 U.S. at 202* (internal quotation marks omitted), an area in which reliance interests are particularly strong, *see Landgraf*, *511 U.S. at 271 & n.25*. Yet the property interests at stake here are based on the City's right to impose and to collect property taxes against portions of foreign missions used for staff housing, and the status of such rights has long been uncertain. Both the India Mission and the Mongolia Mission have consistently taken the position that their entire buildings, including those portions used for staff residences, are tax exempt under the VCCR and the VCDR. We need not decide today whether the Missions' interpretation of these treaties is correct. But we do think that the Missions' arguments have considerable force, and we find this fact relevant in assessing the degree to which the State Department Notice undermined the City's preexisting expectations.

As described earlier, the VCDR exempts from taxation "the premises of the mission," VCDR art. 23, 23 U.S.T. 3227, which are defined as "the buildings or parts of buildings . . . used for the purposes of the mission, including the residence of the head of the mission," *id.* art. 1(i). Similarly, the VCCR establishes a tax exemption for "[c]onsular premises and the residence of the career head of consular post." VCCR, art. 32, 21 U.S.T. 77. The District Court held that because the VCCR and the VCDR specifically recognize a tax exemption for the residences of the "career head

of consular post" and "the head of the mission," the treaties implicitly exclude tax exemptions for any other residences. *See Permanent Mission II, 533 F. Supp. 2d at 460-61.* We are not convinced that this conclusion necessarily follows.

We agree that under the treaties, the only residences that are *categorically* exempt from taxation are those belonging to the head of mission and the head of the consular post respectively. And, indeed, the Missions do not argue that staff residences are always exempt from taxation. Rather they contend that such residences are exempt to the extent they are part of the "consular premises" and "the premises of the mission" that are tax exempt. Moreover, they concede that not all staff residences would fit this description. But they argue that a residence is part of a "consular premises," if it is "used exclusively for the purposes of the consular post," VCCR art. 1(j), and similarly that a residence is part of the "premises of the mission" if it is part of the buildings "used for the purposes of the mission," VCDR art. 1(i).

Under this interpretation of the treaties, it would essentially become a mixed question of law and fact whether India and Mongolia are using staff residences for the purposes of the mission or exclusively for the purposes of the consular post. In the instant case, the Missions insist that the residences serve significant mission and consular functions because they are located in a single facility that also houses diplomatic offices. This arrangement, the Missions argue, enables staff to be on hand to work at odd hours as required by the

time difference between New York City and their home countries, facilitates cost-effective security, and allows staff to participate in cultural events.

We do not today hold the Missions' interpretation of the VCCR and the VCDR to be correct; there are significant arguments that go in the other direction. We disagree, though with the District Court's conclusion that the "plain language of the VCCR and the VCDR unequivocally supports the City's position." *Permanent Mission II, 533 F. Supp. 2d at 461.* Instead, we find the proper scope of the tax exemptions in these treaties decidedly ambiguous—a judgment its drafters might well have shared.[17] In so regarding the treaties'

17. Ernest L. Kerley, one of the United States' treaty negotiators for the VCDR, wrote the following in the 1962—after the treaty was opened for signature but before it had been ratified by the United States—about tax exemption under article 23:

> Since the term "premises of the mission" is defined in Article 1(i) of the convention, the property to which the exemption granted by this article applies is determinable: it applies to the buildings or parts of buildings and the land ancillary thereto used for the purposes of the mission, including the residence of the head of mission. Whether realty held by the sending state as residences for members of the staff of the mission would be immune, would depend on the scope of the term "purposes of the mission." Is the housing of members of the staff of the mission, especially the senior personnel who are expected to entertain members of other missions and of the government of the receiving state, a mission

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language, we are in accord with the view—though not necessarily the final conclusion—expressed by the Fourth Circuit in *County of Arlington, 702 F.2d 485*, which is the only federal appellate decision to have addressed whether the tax exemption in Article 23 of the VCDR applies to residential housing for mission staff.[18] The *County of Arlington* court acknowledged several possible arguments in favor of an exemption, including one akin to the argument rejected by the District Court in this case. *See id. at 487-88* ("While the residence of the head of mission is specifically mentioned as a mission purpose, there is no language compelling a conclusion that living quarters of other mission staff are not also a mission purpose."). The court ultimately endorsed the United States' "candid[] conce[ssion]" in its briefing for that case that the relevant provisions of the VCDR are "ambiguous with respect to the tax immunity of the property in question," and the court itself stated that "[t]here are interpretations [of the VCDR] calling for tax-exemption at least as tenable as

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> purpose? The use of the word "including" in Article 1(i) does not exclude an affirmative answer. . . . The discussions at the Conference do not clarify this problem.

Ernest L. Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, 56 Am. J. Int'l L. 88, 109 (1962).

18. Because of the substantial similarities between the language and structure of the VCCR and the VCDR on the issue of the tax status of staff residences, we consider the Fourth Circuit's reasoning relevant to the VCCR as well.

those to the contrary." *Id. at 487-88.* With the question of interpretation in equipoise, the Court relied on the position of the State Department—which based its view on "generally accepted principle[s] of customary international law"—to "tip[] the scales" in favor of finding an exemption for the staff residences. *Id. at 488.*

The City denies that, in the past, there was ever any uncertainty about whether embassy properties used to house staff would be subject to taxation. It points to guidance documents published by the State Department prior to the 2009 Notice, which stated that "[a]bsent a bilateral agreement, property tax exemption is not generally granted to residences owned by foreign governments used to house members of consular posts or international organizations, except . . . for career heads of the consular posts or chiefs of missions to the international organizations." *See* U.S. Dep't of State, *Foreign Diplomatic and Consular Personnel in the United States: Guidance for Administrative Officers* (the "*Guidance*") § 7.8 (2007), *available at* http://www.state.gov/documents/organization/126637.pdf. More directly on point, the City notes that the State Department made similar statements regarding staff residences for permanent missions to the United Nations in New York City, and even made such statements to the India Mission with respect to the building at issue in this case.[19]

19. The State Department issued a Diplomatic Note to the India Mission in 1993 "remind[ing]" the Mission that

> exemption from property taxes is available only for that portion of the building used to house the

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The City also dismisses the significance of the *County of Arlington* decision. Beyond arguing that the decision is "unpersuasive"—a view shared by the District Court in this case, *see Permanent Mission II, 533 F. Supp. 2d at 461 n.2*—the City contends that the State Department subsequently appeared to limit the position

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> Permanent Mission, which the United States Mission understands will occupy the first four floors of the building, and the residences of the Permanent Representative and the Consul General. The remainder of the building . . . will be subject to New York City property taxes. Therefore, the Mission is encouraged to work with the City of New York to allocate the taxable and non-taxable portions of the structure and to settle other outstanding tax issues relating to the property.

Diplomatic Note HC-06-93 (Feb. 17, 1993). The State Department then reiterated this position in another Note it sent in 2001 to all United Nations missions:

> The government- or mission-owned residence of any individual at the Permanent Mission with the title of Ambassador or Minister Plenipotentiary . . . is also exempt from property tax under *New York Real Property Tax Law [§] 418*. The residence of the Chief of Mission of a consular post enjoys tax exemption under the [VCCR]. All other residential property owned by the Permanent Mission or the sending state and occupied by a diplomat or mission member of lesser rank is subject to property tax . . . .

Diplomatic Note HC-12-01 (Apr. 5, 2001).

it took in the *County of Arlington* litigation to apply only to bilateral missions located in Washington, D.C., and not to missions, typically located in places like New York City, to international organizations like the United Nations. *See Guidance* § 7.8 ("In 1987, exemption from dues and taxes was extended on a reciprocal basis to other foreign government-owned residences used to house members of diplomatic missions in the Washington metropolitan area.").

We do not deny that the City had a good-faith belief that it would be able to impose property taxes on the staff residences for the Missions. But that does not alter the fact that the right to impose taxes was anything but settled prior to the Notice. The governing language of the VCDR and VCCR is ambiguous; the leading federal appellate court decision rejected the City's interpretation of these treaties and recognized a tax exemption for an apartment building located in Arlington, Virginia that housed the staff of a foreign mission to the United States; the State Department issued a public notice subsequent to that decision affirming its position that, at least with respect to bilateral missions, "property owned by diplomatic missions used to house the staff of such missions is exempt from general property tax, subject to reciprocal treatment of comparable property owned by the United States abroad," *Public Notice 975: Property Owned by Diplomatic Missions and Used to House the Staff of Those Missions is Exempt From General Property*

Taxes, 51 Fed. Reg. 27,303, 27,304 (July 30, 1986);[20] and while the City points to several statements issued by the State Department that suggest staff residences for missions to the United Nations and consular offices were considered taxable, none of these statements either a) explain why the Department considered these properties taxable even though analogous properties held by bilateral missions to the United States were not, or b) address whether residential housing located on the same premises as diplomatic offices might serve the purposes of a mission or consular office.[21]

20. This position was reaffirmed on multiple occasions. *See* Diplomatic Note 06-01, at 11 (Apr. 12, 2006), *available at* http://www.state.gov/documents/organization/125059.pdf ("Properties owned by foreign governments and used as residences of the members of the diplomatic mission accredited to the United States may also be granted exemption on the basis of the Vienna Convention on Diplomatic Relations, customary international law and reciprocity."); Diplomatic Note to Sweden (July 18, 2001), *available at* http//www.state.gov/s/l/22686.htm (describing and endorsing conclusion reached in the 1986 notice that recognizes that "the nearly uniform custom and practice of States have ripened into a customary law obligation to provide tax exemption to Government owned residences housing members of the diplomatic mission, subject to reciprocity").

21. In addition, the nature of the City's prior right to tax these buildings—to the extent it existed—and its property interest in the tax liens on the buildings was always circumscribed by the particular difficulties inherent in collecting such taxes. Even though the City is not barred by the FSIA from obtaining declaratory judgments to establish the validity of its tax liens, *see Permanent Mission of India, 551*

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For these reasons, we find that the presumption against retroactivity is not determinative in this case. We emphasize that our holding on this issue is narrow. We do not adopt the Government's contention that the antiretroactivity presumption is generally inapplicable to foreign affairs cases involving public rights. Rather, we conclude that in the circumstances of this case, application of the antiretroactivity clear statement rule is misplaced because the values that underlie that rule are not sufficiently implicated.

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U.S. at 195, the FSIA prevents the City from foreclosing against the Missions to enforce any judgments, *see id. at 196 n.1*; *28 U.S.C. § 1610(a)(4)(B)*. For that reason, the City's ability to vindicate its asserted interests in taxes owed on the Missions' property was always to some degree contingent on the cooperation of foreign sovereigns or on action by the United States federal government. *See Permanent Mission of India*, *551 U.S. at 196 n.1* (describing the ways in which a declaratory judgment on the validity of the City's tax liens could benefit the City including, *inter alia*, a) the tradition of compliance by foreign sovereigns to final judgments on tax liability, and b) the prospect that foreign aid by the United States to countries would be reduced by 110% of the outstanding debt pursuant to Congressional appropriations legislation). In that regard, the City's interest was tied up with "political realities and relationships" involving foreign sovereigns, *Altmann*, *541 U.S. at 696*, which makes it different from standard property interests, even including those asserted by public entities.

B.

While the FMA does not contain the sort of *express* authorization for the State Department to issue a rule that operates retroactively that overcoming full application of the antiretroactivity presumption would require, *see Rock of Ages Corp., 170 F.3d at 158*, we believe that the statute is best read to permit the State Department to do what it seeks to do and apply the exemption to "taxes that have been . . . assessed" and to "nullify any existing tax liens," *74 Fed. Reg. 31,788*. This follows not only from the FMA's substantial delegation of discretionary authority to the State Department, but also from the criteria guiding the Secretary's benefit determinations and from the policies embodied in the statute.

The FMA directs the State Department "to support the secure and efficient operation of United States missions abroad" and to do likewise for foreign missions located in the United States. *22 U.S.C. § 4301(b)*. Achieving this goal may require the mediation of conflicts between the United States and foreign countries, a prospect that the FMA explicitly contemplates in setting forth criteria for the provision of benefits. *See 22 U.S.C. § 4304(b)(4)* (directing the Secretary to provide benefits and set terms and conditions on their enjoyment if such action is "reasonably necessary . . . to assist in resolving a dispute affecting United States interests and involving a foreign mission or sending State"). We think it would be anomalous to read the FMA as requiring the State Department to resolve disputes involving foreign

missions through the designation of benefits, and yet to tie the Department's hands by limiting it to prospective solutions that may not address the sources of the conflicts.

In the instant case, for instance, the State Department asserted that action on its part was needed to "resolv[e] a dispute affecting U.S. interests and involving foreign governments which assert that international law requires the exemption from taxation of such diplomatic and consular properties." *74 Fed. Reg. 31,788.* It seems unlikely that this disagreement—which the State Department tells us has "become a major irritant in the United States' bilateral relations and threatens to cost the United States hundreds of millions of dollars," *id.*—could be effectively resolved by the establishment of an exemption that was only forward-looking and that left the Missions on the hook for decades of property taxes along with significant back interest payments. Accordingly, we cannot read the FMA, which was intended to give the State Department flexible tools to carry out United States foreign-policy objectives, as so restricted.

IV.

In addition to objecting to the substance of the State Department Notice, the City also challenges the procedure by which the Notice was promulgated. Specifically, the City contends that the State Department issued the Notice without allowing first for notice and comment, and that doing so was improper.

We disagree, and conclude that though the Notice is a final rule with the force of law, it is exempt from the procedural requirements of the Administrative Procedure Act ("APA"), *5 U.S.C. § 553*, because the Notice "involved . . . a . . . foreign affairs function of the United States," *id. § 553(a)(1)*.

The APA provides that federal courts "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law . . . ." *5 U.S.C. § 706(2)(D)*. *Section 553* of the APA generally requires notice of a proposed rulemaking in the Federal Register and an opportunity for interested persons to comment. *Id. § 553*. The Section, however, exempts from its coverage "regulations involving 'a military or foreign affairs function of the United States.'" *Rajah v. Mukasey, 544 F.3d 427, 437 (2d Cir. 2008)* (quoting *5 U.S.C. § 553(a)(1)*). The APA's legislative history indicates that "[t]he purpose of the [foreign affairs] exemption was to allow more cautious and sensitive consideration of those matters which 'so affect relations with other Governments that, for example, public rule-making provisions would provoke definitely undesirable international consequences.'" *American Ass'n of Exporters & Importers-Textile & Apparel Group v. United States, 751 F.2d 1239, 1249 (Fed. Cir. 1985)* (quoting H.R. Rep. No. 79-1980, at 23 (1946)).

We have stated that "exceptions to *[section] 553* should be narrowly construed and only reluctantly countenanced." *Zhang v. Slattery, 55 F.3d 732, 744 (2d*

Cir. 1995), superseded on other grounds by statute, 8 U.S.C. § 1101(a)(42) (internal quotation marks omitted); *see also Jean v. Nelson, 711 F.2d 1455, 1477 (11th Cir. 1983)* (citing the legislative history of the APA that indicates exceptions to notice and comment should be "construed narrowly"). We reaffirm that statement. But we find that the Notice in the case before us easily falls within the foreign affairs exception. The State Department's regulation of the reciprocal treatment to be afforded foreign missions in the United States and its conferral of benefits to the missions and consular offices of foreign governments that conduct diplomatic activities within the United States relates directly to, and has clear consequences for, foreign affairs.

The City tries to resist this conclusion by reading restrictive conditions into our prior cases dealing with the foreign affairs exception. The City argues that the exception governs only if one of two circumstances is met: either if the rulemaking does "no more than implement" a formal international agreement, *see Int'l Bhd. of Teamsters v. Pena, 17 F.3d 1478, 1486, 305 U.S. App. D.C. 125 (D.C. Cir. 1994)* (citing *WBEN, Inc. v. United States, 396 F.2d 601, 616 (2d Cir. 1968))*, or if public notice and comment would provoke "definitely undesirable international consequences," such as a) the revelation of sensitive foreign intelligence, b) the impairment of relations with other countries, or c) excessive delay when urgent action is required, *see Rajah, 544 F.3d at 437-38* (recognizing these possibilities as "at least three definitely undesirable international consequences that would follow from notice and

comment rulemaking" in that particular case). Because the State Department's benefit designation in the Notice concededly does not implement a formal international agreement, the City contends that—in order for the exception to apply—we need to identify specific undesirable international consequences that would have followed from public rulemaking in this particular case.

But the City takes language from our prior cases out of context. The cases upon which the City relies addressed a quite different question than what is at issue here: the extent to which the foreign affairs exception should apply to immigration rules. The dangers of an expansive reading of the foreign affairs exception in that context are manifest. While "immigration matters typically implicate foreign affairs" at least to some extent, *Yassini v. Crosland, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980)*, it would be problematic if incidental foreign affairs effects eliminated public participation in this entire area of administrative law. Reflecting such concerns, we observed in *Zhang v. Slattery* that while "[o]n occasion, courts have applied [the foreign affairs] exception to immigration rules," courts have also regularly limited the exception in this context to prevent the exception from "becom[ing] distended." *55 F.3d at 744* (internal quotation marks omitted). This approach accords with Congress's admonition in the legislative history of the APA not to interpret the phrase "'foreign affairs function' . . . loosely . . . to mean any function extending beyond the borders of the United States." S. Rep. No. 79-752, at 13 (1945); *see also* H.R. Rep. No. 79-1980, at 23 (1946).

By contrast, the action taken by the State Department to regulate the treatment of foreign missions implicates matters of diplomacy directly. Recognizing the applicability of the foreign affairs exceptions in this context does not raise the same concerns of loose interpretation, *see id.*, and hence the value of analogies between the instant case and immigration cases is correspondingly low. Though the foreign affairs exception extends beyond diplomacy, diplomatic functions, such as those here involved, represent the exception's paradigm case.

In short, while a case-by-case determination that public rule making would provoke "definitely undesirable international consequences," may well be necessary before the foreign affairs exception is applied to areas of law like immigration that only indirectly implicate international relations, quintessential foreign affairs functions such as diplomatic relations and the regulation of foreign missions are different. Such actions "'clearly and directly' involve a 'foreign affairs function,'" *see Mast Indus., Inc. v. Regan, 596 F. Supp. 1567, 1582, 8 Ct. Int'l Trade 214 (Ct. Int'l Trade 1984)* (quoting H.R. Rep. No. 79-1980, at 23 (1946)), and so fall within the exception without a case-by-case iteration of specific undesirable consequences. To hold otherwise would turn the phrase "provoke definitely undesirable international consequences" from an illustration given in the APA's legislative history—*see* H.R. Rep. No. 79-1980, at 23 (1946) (explaining that the exception should apply only to matters which "so affect the relations of the United States with other governments that, *for example*, public

rule-making would provoke definitely undesirable international consequences" (emphasis added))—into the definition for "foreign affairs function." That we are not prepared to do.

One final argument by the City against our application of the foreign affairs exception to the Notice, however, merits discussion. The City contends that the legislative history of the FMA demonstrates that Congress did not want an exemption from notice and comment to apply to actions taken by the Department of State under this particular statute. The bills passed by both the Senate and the House of Representatives originally contained an exemption from APA rule making under *section 553* for actions taken by the State Department under the FMA (except for actions taken under a section of the FMA addressing the location of foreign missions in the District of Columbia). *See* S. 854 *§ 208(g), reproduced in* S. Rep. No. 97-283, at 30 (1981) (codified as enacted at *22 U.S.C. § 4308(g)*) ("Except as provided in . . . 206(b), actions taken under the authority of this title shall not be considered rulemaking within the meaning of *section 553* . . . ."); H.R. Rep. No. 97-102, pt. 1, at 40 (1981) (describing the same provision). As explained by the Report of the Senate Governmental Affairs Committee, this exemption was included because most of the actions under the FMA were "political in nature, involving considerations of foreign policy and national security." S. Rep. No. 97-329, at 18-19 (1981). The provision was not unanimously endorsed, however. The "minority views" recorded in the Report by this committee objected to the *section 553* blanket

exemption. These senators argued that there were "no sufficiently compelling diplomatic reciprocity reasons for exempting the [Office of Foreign Missions] from federal rulemaking." *See id.* at 46 (minority views). For reasons that were neither explained nor even mentioned in the subsequent Conference Report, this blanket exemption provision from the APA was ultimately deleted from the final bill that Congress enacted.

The City maintains that, in light of this legislative history, we should not interpret the "foreign affairs function" exception in *§ 553(a)(1)* to apply to the State Department's benefit designations under the FMA when Congress specifically deleted such an exception from the FMA itself. This contention has initial plausibility. But we decline to rely on the FMA's ambiguous legislative history and Congress's apparent decision not to enact an FMA-specific blanket exemption from APA rules to alter what we believe is the best interpretation of these generally applicable APA rules, *i.e.*, *section 553(a)(1)*. Subsequent organic statutes may supersede or modify APA requirements, but they must do so expressly. *See Yale-New Haven Hosp., 470 F.3d at 78* (citing *5 U.S.C. § 559*). And we are especially reluctant to modify our application of *section 553* of the APA based on what Congress did *not* say in the FMA.

V.

Because we hold that the State Department's Notice was a lawful exercise of the Department's power under the FMA, we decline to address the other issues

originally raised in this appeal. Specifically, we take no ultimate position as to whether the Missions would have been exempt from property taxation in the absence of the Notice, either under international law pursuant to the VCCR and VCDR, or under *section 418* of the New York Real Property Tax Law. We also do not address any of the questions raised regarding the District Court's calculation of damages.

CONCLUSION

We hold that the State Department acted within its statutory authority under the FMA in issuing the Notice. Under the Notice, the City's tax liens are invalid and no taxes on property owned by foreign governments and used to house staff of permanent missions to the United Nations or of consular posts are due and owing. Accordingly, we VACATE the opinion of the District Court. We also REVERSE the judgment of the District Court, and we REMAND to the District Court with instructions to DISMISS the actions brought against the Missions.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DECIDED MARCH 17, 2008

03 Civ. 3256 (JSR), 03 Civ. 6085 (JSR), 03 Civ. 6086 (JSR)

CITY OF NEW YORK, Plaintiff, -v- PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, et al., Defendants. CITY OF NEW YORK, Plaintiff, -v- REPUBLIC OF PHILIPPINES, et al., Defendants. CITY OF NEW YORK, Plaintiff, -v- THE BAYARYN JARGALSAIKHAN, AS PRINCIPAL RESIDENT REPRESENTATIVE TO THE UNITED NATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC, et al., Defendants.

JUDGES: JED S. RAKOFF, U.S.D.J.

OPINION BY: JED S. RAKOFF

OPINION

MEMORANDUM ORDER AND FINAL JUDGMENT

JED S. RAKOFF, U.S.D.J.

By Order dated February 8, 2008, the Court granted summary judgment to plaintiff the City of New York (the "City") on its tax claims against defendants the Permanent Mission of India to the United Nations ("India"), the Principal Resident Representative to the United Nations of the Mongolian People's Republic

("Mongolia"), and the Republic of the Philippines (the "Philippines") except with respect to the portions of the Philippines' property occupied by a restaurant. The Court directed the City to submit a letter setting forth the amounts due from each defendant as a result of these rulings, including interest through February 25, 2008, and directed defendants to submit any objections to the City's calculations. In response to defendants' objections, the Court solicited further submissions from both sides, all of which have been carefully reviewed. For the reasons that follow, the Court rejects defendants' objections to the City's calculations and enters final judgment in the amounts determined by the City.

Defendants' general objection is that the interest imposed by the City is exorbitant as compared to the amount of taxes actually owed, particularly in light of the City's alleged delay in bringing these lawsuits and the fact that the legal question of whether the taxes were due was a "close" one.[1] Letter of Robert A. Kandel, dated February 21, 2008, at 3. As the City observes, however, the amount of interest due on delinquent tax payments is set by statute, *see N.Y.C. Admin. Code § 11-224(h)*, and courts have no discretion to alter the

1. Defendants initially argued, in addition, that the taxes are not "due and payable" (such that interest begins to accrue on them), *see N.Y.C. Admin. Code § 11-224(f)*, until entry of final judgment in this case. The City responded that, by law, taxes become "due and payable" at the end of the taxable term, *see New York City Charter § 1519*. Defendants did not renew this argument in their second submission to the Court, and the Court, in any case, rejects it.

amount of interest due, *see, e.g., Delafield 246 Corp. v. City of New York, 11 A.D.3d 268, 782 N.Y.S.2d 441, 445 (1st Dep't 2004)*. Moreover, the Court does not agree that there was any relevant delay, since the City promptly billed the defendants for the taxes as they came due. Finally, even if the issues in this case were a great deal "closer" than the Court believes, this is totally irrelevant to the imposition of interest. Accordingly, the Court overrules the defendants' general objections.

Defendants also raise several objections to the specific amounts of tax assessed, only three of which warrant discussion:

First, India objects that the City erred in calculating its tax on the residential portions of its property starting in July 1991 because those portions were not actually occupied until January 1993. At no previous point in this litigation has India articulated this argument in any genuine fashion; the fact that, in an affidavit submitted in January 2004 in connection with a motion to dismiss on other grounds, an employee of the Indian Mission stated in a single sentence that "[d]iplomats and staff began to occupy the Mission starting in January 1993" is hardly sufficient to preserve the issue. Affidavit of Ruchira Kamboj in Support of Motion to Dismiss P 3. Even if that were not the case, moreover, Mr. Kamboj states in the same paragraph of his affidavit that construction of the Mission began in June 1989, and nowhere suggests that the portion ultimately used as residences was intended to serve any other purpose or was otherwise exempt. *See N.Y. Real Prop. Tax L. § 420-*

a(3)(a) (providing that property is tax-exempt while under construction if it is contemplated to be used for charitable purposes); *New York Botanical Garden v. Assessors of Washington, 55 N.Y.2d 328, 334, 434 N.E.2d 703, 449 N.Y.S.2d 467 (1982)* (stating that burden of proof lies with taxpayer who is seeking to have real property declared tax exempt).[2]

Second, India argues that the calculated amount fails to take account of a tax refund India has claimed for $ 450,674.68. The refund, however, relates to a period entirely prior to the period at issue in this litigation. Moreover, India has not previously raised any argument related to this refund, nor has it interposed a counterclaim for the refund amount. The City indicates that it "is willing to discuss this matter with India outside of the context of this litigation," Letter of John Low-Beer, dated March 4, 2008, at 4 ("Low-Beer Letter"), and that is where India may pursue it, if at all.

Third, the Philippines argues that the City overstated the total square footage of its building and thus the percentage of the building that was occupied by the bank and airline, and that this error caused the

2. The City also contends that regardless of whether India preserved this objection in this litigation, the objection could only properly have been raised in a proceeding under Article 7 of the New York Real Property Tax Law. *See, e.g., Emunim v. Fallsburg, 78 N.Y.2d 194, 204, 577 N.E.2d 34, 573 N.Y.S.2d 43 (1991)*. As India failed to preserve its objection here and, in any event, the objection lacks merit, the Court need not address this issue.

City to overstate the amount of tax owed. As the City has explained in its letter, however, and as the sworn Declaration of Rochelle Patricof, First Deputy Commissioner of the New York City Department of Finance ("Patricof Decl."), attests, the tax assessment was based solely on the amount of space occupied by the bank and airline offices, and the building's total square footage was therefore irrelevant. *See* Low-Beer Letter at 4; Patricof Decl. P 14. Defendants have offered no reason why the Court should discount this sworn—and indeed, highly logical—representation.[3]

The Court has considered the defendants' other arguments, and finds them wholly without merit. Accordingly, final judgment is hereby entered in favor of the City of New York as follows: against India in the amount of $ 42,451,769.35; against Mongolia in the amount of $ 4,395,003.13; and against the Philippines in the amount of $ 10,902,895.81. These amounts include interest calculated through February 25, 2008, and on consent of the parties, all interest thereafter will be

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3. Defendants appear to suggest that, had the assessors relied on what defendants claim was an accurate figure for the building's square footage, they might have accorded the building a lower property value, and therefore taxed the space occupied by the bank and airline at a lower rate. However, defendants cite nothing to suggest that the difference between the City's total calculated square footage (39,100 square feet) and the Philippines' proposed square footage (47,230 square feet) could have affected the market value of the building, a possibility the Court finds unlikely.

calculated on the basis of federal post-judgment rates, although, for all other purposes, this judgment is to be deemed entered today (March 17, 2008).

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York

March 17, 2008

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DECIDED FEBRUARY 8, 2008, FILED FEBRUARY 11, 2008

03 Civ. 3256 (JSR), 03 Civ. 6085 (JSR), 03 Civ. 6086 (JSR)

CITY OF NEW YORK, Plaintiff, -v- PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, et al., Defendants. CITY OF NEW YORK, Plaintiff, -v- REPUBLIC OF PHILIPPINES, et al., Defendants. CITY OF NEW YORK, Plaintiff, -v- THE BAYARYN JARGALSAIKHAN, AS PRINCIPAL RESIDENT REPRESENTATIVE TO THE UNITED NATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC, et al., Defendants.

JUDGES: JED S. RAKOFF, U.S.D.J.

OPINION BY: JED S. RAKOFF

OPINION

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

These three related cases pit the City of New York against the governments of India, Mongolia, and the Philippines. The subject, of course, is taxes.

Appendix C

Specifically, plaintiff the City of New York (the "City") seeks to recover property taxes from the Republic of the Philippines (the "Philippines"), the Permanent Mission of India to the United Nations ("India"), and the Principal Resident Representative to the United Nations of the Mongolian People's Republic ("Mongolia") on portions of the buildings housing defendants' New York consulates and missions to the United Nations. With respect to the Philippines, the City says that taxes are due on portions of such property used for a restaurant, a bank, and an airline office. With respect to India and Mongolia, the City says that taxes are due for the portions of such property used as residences for employees below the level of head of mission. In response, defendants principally argue that these same portions of their property are exempt from taxation under the Vienna Convention on Consular Relations, 21 U.S.T. 77 (1963, ratified 1969), the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227 (1961, ratified 1972), customary international law, New York common law, and, as to the Philippines, *section 418* of the New York Real Property Tax Law.

By way of background, after the City had assessed the taxes in question, the defendants refused to pay, whereupon, by operation of law, the tax assessments converted to tax liens against the properties. The City then brought these actions in 2003, seeking as to each defendant both a declaration that the liens are valid and a money judgment in the amount of the withheld taxes. The City sought the declarations, despite its admitted inability to foreclose on the properties, because (i) it believes that once the liens are declared valid the

defendants may voluntarily choose to pay their tax liability; (ii) in the face of a valid court judgment, the United States may reduce each defendant's foreign aid by 110 percent of the outstanding debt, *see* Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006, § 543(a), 119 Stat. 2214; Consolidated Appropriations Act of 2005, § 543(a), 118 Stat. 3011; and (iii) the liens would be enforceable against subsequent purchasers. *See Permanent Mission of India to the United Nations v. City of New York, 127 S. Ct. 2352, 2355 n.1, 168 L. Ed. 2d 85 (2007).*

Procedurally, these cases were originally assigned to the late Judge Richard Conway Casey, U.S.D.J. India and Mongolia then moved to dismiss on the ground that they were immune from this Court's jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), *28 U.S.C. § 1602 et seq.* Judge Casey, however, concluded that he had jurisdiction pursuant to the FSIA's "immovable property exception," *id. § 1605(a)(4)*, and that determination was then affirmed by the Second Circuit Court of Appeals, *City of New York v. Permanent Mission of India to the United Nations, 446 F.3d 365 (2d Cir. 2006)*, and, ultimately, by the Supreme Court of the United States, *Permanent Mission of India to the United Nations v. City of New York, 127 S. Ct. 2352, 2355, 168 L. Ed. 2d 85 (2007).*[1] Meanwhile, all parties filed motions for summary judgment, and these motions

1. The Philippines, although not moving to dismiss on the ground of want of jurisdiction, made a similar argument in papers it filed, prior to the Supreme Court's decision, in support of its instant motion for summary judgment. In light of the Supreme Court's subsequent decision, however, the argument is no longer tenable.

remained pending when, following Judge Casey's untimely death in 2007, the cases were transferred to the undersigned.

The Court now resolves those motions by holding, for the reasons discussed below, that the disputed portions of the residential property owned by India and Mongolia are subject to real estate taxation, as are the portions of the Philippines' property occupied by a bank office and an airline office, but that the portion of the Philippines' property used to house a restaurant is exempt from taxation.

I. India and Mongolia

The following facts are undisputed:

At all times here relevant, India owned a twenty-six story building located at 235 East 43rd Street, New York, New York. Plaintiff's Local Rule 56.1 Statement in No. 03 Civ. 3256 ("Pl. 56.1 - India") at PP 2-3; India's Local Rule 56.1 Counter-Statement in No. 03 Civ. 3256 ("Def. 56.1 - India") at PP 2-3. The first six floors of the building house the offices of India's Permanent Mission to the United Nations, while the upper twenty floors contain residential units for employees of the Mission and of the Indian Consulate, all ranking below the head of mission. Pl. 56.1 - India at PP 4, 6; Def. 56.1 - India at PP 4, 6. The employees are Indian citizens who receive housing from the mission rent-free in accordance with Indian law. Def. 56.1 - India at P 17; Pl. Counter-Statement Pursuant to *Local Rule 56.1* in No. 03 Civ.

3256 ("Pl. Counter-56.1 - India) at P 17. The City has assessed property taxes on the residential portion, along with charges for sidewalk repairs and elevators. Pl. 56.1 - India, at PP 11-12. The City calculates that, as of September 12, 2007, the Mission owed $ 39,394,524.37 in property taxes and other charges, including interest. *Id.* at P 15.

At all relevant times, Mongolia owned a six-story building located at 330 East 46th St., New York, New York. Plaintiff's Local Rule 56.1 Statement in No. 03 Civ. 6086 ("Pl. 56.1 - Mongolia") at PP 2-3; Mongolia's Local Rule 56.1 Counter-Statement in No. 03 Civ. 6086 ("Def. 56.1 - Mongolia") at PP 2-3. The first two floors of the building house offices of Mongolia's Permanent Mission to the United Nations, and the third floor contains the residence of Mongolia's Ambassador to the United Nations. Pl. 56.1 - Mongolia at PP 5-6; Def. 56.1 - Mongolia at PP 5-6. The remaining two floors are devoted to housing for employees of the Mission, all below the rank of head of Mission, and their families. Pl. 56.1 - Mongolia at PP 5-6; Def. 56.1 - Mongolia at PP 5-6. The City seeks to tax the top two floors only, and has calculated that, as of September 12, 2007, Mongolia owed $ 4,239,147.25 in property taxes, including interest, on that portion of the property. Pl. 56.1 - Mongolia, at P 13.

Although India and Mongolia argue that the property used to house consular and diplomatic staff is exempt from taxation, their argument falters in the face of the plain language of the international conventions

applicable to this issue. The tax status of the consular portions of the premises is controlled by Article 32 of the Vienna Convention on Consular Relations ("VCCR"), which provides:

> Consular premises *and the residence of the career head of consular post* of which the sending State or any person acting on its behalf is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.

VCCR art. 32 (emphasis supplied). While India and Mongolia try to argue that the consular residences here in question are part of the "consular premises," Article 32, on its face, distinguishes for tax purposes between "consular premises" and "residence" and limits the tax exemption respecting residence to "the residence of the career head of consular post" and none other. As the Supreme Court stated in *Sumitomo Shoji Am. v. Avagliano, 457 U.S. 176, 180, 102 S. Ct. 2374, 72 L. Ed. 2d 765 (1982)*, "Interpretation of [a treaty] must, of course, begin with the language of the [t]reaty itself. The clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." (internal quotation marks omitted).

Appendix C

The tax status of the U.N. Mission portions of the premises is controlled by the Vienna Convention on Diplomatic Relations ("VCDR"). It reaches the same result as the VCCR but through a slightly more circuitous route. First, Article 1 of the VCDR defines "premises of the mission" as consisting of:

> the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission, *including the residence of the head of the mission.*

VCDR Art 1(i) (emphasis supplied). Then, Article 23 of the VCDR provides:

> The sending State *and the head of mission* shall be exempt from all national, regional, or municipal dues and taxes *in respect of the premises of the mission,* whether owned or leased, other than such as represent payment for specific services rendered.

VCDR art. 23 (emphasis supplied). These two provisions of the VCDR, when taken together, make plain that the residential exemption from taxes is limited to "residence of the head of the mission," and not to others.[2]

2. To the extent that the opinion in *United States v. County of Arlington, 702 F.2d 485 (4th Cir. 1983)*, can be read as contrary to this analysis, it is not, in the Court's view, persuasive. Moreover, *County of Arlington* was based in significant extent on the position then taken by the U.S. State Department, which the Department subsequently reversed. Thus the State

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In short, the plain language of the VCCR and the VCDR unequivocally supports the City's position, and that is really the end of the matter. Indeed, of the remaining arguments to the contrary proffered by India and Mongolia, only one even merits mention. This is the argument that portions of the premises in issue are exempt from New York taxation by virtue of "customary international law" as construed as part of New York common law by the New York Court of Appeals in *Republic of Argentina v. City of New York, 25 N.Y.2d 252, 250 N.E.2d 698, 303 N.Y.S.2d 644 (1969)*. But despite some broad dicta in the opinion, the issue in *Republic of Argentina* was simply whether, under customary international law, consular premises were entitled to the same scope of exemption as diplomatic premises. Now that, subsequent to *Republic of Argentina*, the U.S. has

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(Cont'd)
Department's current version of its publication *Foreign Diplomatic and Consular Personnel in the United States: Guidance for Administrative Officers* states that "[a]bsent a bilateral agreement, property tax exemption is not generally granted to residences owned by foreign governments used to house members of consular posts or international organizations" other than career heads of the consular posts or chiefs of missions to the international organizations. U.S. Dep't of State, *Foreign Diplomatic and Consular Personnel in the United States: Guidance for Administrative Officers* § 7.8, at 7-3 to 7-4 (July 25, 2007), *at* http://www.state.gov/documents/organization/27910.pdf (cover and table of contents), http://www.state.gov/documents/ organization/ 27803.pdf (section 7, entitled "Real Estate Property Tax Exemptions"), Ex. A to Decl. of John R. Low-Beer in Support of Pl. Mot. for Summ. J. in No. 03 Civ. 3256 ("Low-Beer Decl. - India").

ratified the VCCR, it is that treaty, and not customary international law, that controls the scope of the consular exemption, just as it is the VCDR that controls the scope of the diplomatic exemption.

II. The Philippines

The following facts are, except where noted, undisputed:

In 1973, the Republic of the Philippines acquired 556 Fifth Avenue (the "Philippine Center") to house within its premises all of the Philippines' offices and agencies in New York City, including the Mission to the United Nations and the Consulate General. Joint Statement of Undisputed Facts in 03 Civ. 6085 at PP 1-3 ("Joint Statement"). The Philippine Government established the Philippine Center Management Board (the "Management Board") to manage and operate the building. *Id.* at P 4. At various times, portions of the premises were used for a restaurant, a bank, and an airline office. The City, relying on the Philippines' representation of the square footage used for these purposes, calculated that it was owed $ 19,017,691.17 in taxes as of September 16, 2005.

The Restaurant: Between 1974 and 1982, the cellar of the Philippine Center was occupied by Maharlika (or "the Restaurant"), a restaurant owned by the Philippine Government. *Id.* at P 9. Maharlika, which served lunch

and dinner to Philippine Center staff and to the public,[3] served authentic Filipino cuisine, employed Filipinos only, and was staffed with a Filipino dance troupe and musicians who performed a show during dinner. *Id.* P 11-12; March 11, 1976 Letter of Price Waterhouse & Co. to Ernesto C. Pineda, Consul General of the Philippines ("PWC Letter"), Ex. 10 to Decl. of John Low-Beer in 03 Civ. 6085 ("Low-Beer Decl. - Philippines"). Through its culinary offerings and the evening performance, Maharlika showcased Philippine culture, folk art, ethnic music and dance to guests of the Mission and the Consulate General. Def. Statement Pursuant to *Local Rule 56.1* at P 12 ("Def. 56.1 - Philippines"); Pl. Counter-Statement Pursuant to *Local Rule 56.1* at P 12 ("Pl. Counter-56.1 - Philippines).

Two business corporations operated Maharlika over the course of the restaurant's tenure in the Philippine Center. In 1974, the Management Board entered into an agreement with Au Bon Vivant of the Philippines ("ABV") to lease the cellar space and operate Maharlika. Joint Statement at P 14; Management Operation and Lease Agreement Between the Management Board and ABV (the "ABV Agreement"), Ex. 15 to Low-Beer Decl. - Philippines. The ABV Agreement stated that in contracting with ABV to operate the restaurant, the Philippine Center "ha[d] the objectives of enhancing the image of the Philippines by promoting Filipino culture and traditions which will encourage foreign tourists to

3. The parties dispute whether, and to what extent, Maharlika advertised to the general public.

visit the Philippines and create an expanding market for Filipino products in the United States." *Id.* at PMB 0002. The Agreement provided that the Management Board would install "a completely equipped and furnished Filipino restaurant plus all accessories and incidentals — in effect, a 'turn-key' restaurant at basement level" and "[p]rovide cash advances for ABV's account . . . i.e; reasonable operating funds until the operation is self-sufficient," which ABV would repay each month to the extent they exceeded foreseeable cash requirements for the following sixty days. *Id.* at PMB 0002-03, 06. In exchange, ABV was to be "totally responsible for every phase of [the restaurant's] operation, management and supervision" and to "use its best efforts to assist the 'Philippine Center' [by operating the restaurant] as a 'showcase' of the Republic of the Philippines cultural heritage by providing New York City with the best of traditional Filipin[o] service, food and entertainment." *Id.* at 0003, 0005. The Management Board retained several rights under the Agreement, however, including the right to preempt the use of Maharlika for official functions upon five days' notice, the right to inspect the premises and all aspects of ABV's operation "to ensure the [Management Board's] objectives in establishing the [restaurant] are maintained," and the rights to the trade name "Maharlika." *Id.* at 0004-06. ABV was to receive a management fee of five percent of monthly sales. *Id.* at 0004.

ABV operated Maharlika until 1977, when a dispute over the cash advances gave rise to a "bitter struggle"

between ABV and the Management Board. Memorandum on the Proposed Renewal of Maharlika Contract, from Ernesto Pineda, Consul General of the Philippines and Chairman of PCMB, at PMB 0209, Ex. 16 to Low-Beer Decl. - Philippines. As a result of the dispute, ABV commenced litigation in New York State Supreme Court, which was eventually settled. The parties' settlement agreement, among other things, terminated the lease and management contract. Joint Statement at PP 25-27; Agreement Between the Management Board and ABV and Nora V. Daza, Ex. 17 to Low-Beer Decl. - Philippines.

Following the termination of the ABV Agreement, the Philippine Department of Trade entered an agreement with Sulo Management Company, Inc. ("Sulo") in July 1977. Agreement (the "Sulo Agreement"), Ex. 18 to Low-Beer Decl. - Philippines. The Sulo Agreement stated that both parties wished to maintain a restaurant "that will project an image which is representative of the best in Philippine life, culture and cuisine," and that "the primary objective of the Philippine Government in setting up said restaurant is not to make a profit for said Government but to provide a showcase of the country's culture, and thereby encourage foreign tourists to visit the Philippines and expand foreign markets for Philippine products." Joint Statement at PP 30-31. Under the Agreement, Sulo paid no rent but bore all operating costs, including utilities. Joint Statement at P 36. The Philippine Government turned over to Sulo all existing assets of Maharlika, such as silverware, linens, furniture and equipment. Sulo

Agreement at PMB 0014-15. The Agreement also provided that Sulo would implement "suggestions . . . for the betterment of the business" by the Philippine Commercial Attache to the extent they were practicable and consonant with general restaurant practices. Sulo Agreement at PMB 0016.

In 1981, the parties executed a second agreement on substantially the same terms, although this agreement additionally provided that Sulo would shoulder the costs of "taxes and assessments relative to restaurant operations that may accrue in favor of the U.S. Government or any of its instrumentalities." Memorandum of Agreement, Ex. 19 to Low-Beer Decl. - Philippines. Sulo did not pay any rent under the second agreement; that Agreement provided that in case of future renewal, the agreement would not be rent-free, but the agreement was never renewed. Joint Statement at P 40. In December 1982, Sulo wrote to the Management Board stating that Sulo had been advised of the intent of the Management Board to bill rental fees retroactive to 1977, which Sulo stated was not stipulated in the contract. *Id.* at P 41. Sulo advised it would turn over the restaurant on January 1, 1983. *Id.* Maharlika closed at the end of 1982. *Id.* P 42. In October 1986, the Management Board sent a letter to Sulo requesting payment of $ 108,192.81 for Sulo's share of utility and garbage hauling charges. *Id.* at P 43.

The Bank: On November 5, 1987, the Management Board entered into an agreement with the Philippine National Bank ("PNB" or the "Bank") whereby the Bank

agreed to lease for five years the cellar space formerly occupied by Maharlika. [4] Joint Statement at P 45. The annual rent was $ 70,000 ($ 16 per square foot of space) for the first year and was scheduled to escalate each year, up to $ 110,000 in the fifth year. *Id.* at P 46. A rider to the lease provided that "[t]he TENANT shall pay for the taxes due on the entire premises leased to it." Agreement of Lease at PH11142, Ex. 29 to Low-Beer Decl. - Philippines. [5]

In 1992, PNB and the Management Board began discussions concerning the renewal of PNB's lease,

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4. PNB was established in 1916 and functioned as the central bank of the Philippines until 1949. Republic of the Philippines' Statement of Undisputed Facts Pursuant to *Local Rule 56.1*, at P 33 ("Pl.56.1 - Philippines"); Pl. Counter-Statement Pursuant to *Local Rule 56.1*, at P31 ("Pl. Counter-56.1 - Philippines"); History of Philippine National Bank, *at* http://www.pnb.com.ph/history.asp ("PNB Website"), Ex. 57 to Rep. Low-Beer Decl. - Philippines; Tr. at 83. PNB remained wholly government-owned until 1989, when the Government's ownership decreased to seventy percent. *See* PNB Website; Pl 56.1 at P 35.

5. The provision provided in full:

> The OWNER hereby warrants that there are no outstanding and unpaid taxes on the land and building on which the leased premises form a part, except real estate taxes assessed by New York City, which are being contested by OWNER; and that the OWNER shall hold the TENANT harmless of any such outstanding and unpaid taxes; The TENANT

(Cont'd)

which continued until late 1995. Joint Statement at P 49. The parties disagreed on renewal terms in a number of respects, including but not limited to the rental rate and the amount of real estate tax for which the Bank should be held liable. *See* Letter from Pedro Reyes, Acting General Manager of the Philippine National Bank, dated November 25, 1994, at PMB 0147, Ex. 26 to Low-Beer Decl. - Philippines; Memorandum from Manuel Valdehuesa, Secretary/Manager of the Management Board, to Manager of PNB, dated Feb. 15, 1995, Ex. 28 to Low-Beer Decl. - Philippines; Transcript of September 17, 2007 Hearing ("Tr.") at 75-76. [6] During the period following the expiration of the original lease, the Management Board accepted rental payments from PNB under protest, claiming that they were too low. *See* Letters and Related Correspondence Between PCMB and PNB from October 1992 to April 1996, Ex. 59 to Rep. Decl. of John Low-Beer ("Rep. Low-Beer Decl. - Philippines"). The lease was never renewed, and PNB vacated the premises in May 1996. Joint

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(Cont'd)

> shall pay for the taxes due on the entire premises leased to it

Agreement of Lease at PH11142. This paragraph seemingly reflected the intention of the Management Board to hold PNB accountable for any taxes assessed on the property in the future.

6. On September 17, 2007, the Court held a hearing to determine which material facts the parties actually disputed. *See Fed.R.Civ. P. 43(e).* If a witness at that hearing presented a fact that neither side challenged in any way, the Court assumes for the purposes of these motions that the fact is undisputed.

Statement at P 51; Correspondence from PNB to PCMB, Ex. 33 to Low-Beer Decl. - Philippines. In the several years that followed, PNB and the Management Board engaged in a protracted struggle over rental arrears PCMB claimed that PNB owed it. The Management Board referred PNB's account to a collection agency and the parties ultimately settled the claim. Correspondence, Ex. 35 to Low-Beer Decl. - Philippines; Tr. at 63.

During the period of PNB's tenancy at the Philippine Center, PNB acted as a fiscal agent of the Philippine Government, in that the Government maintained accounts there, including accounts of Philippine embassies and consulates in the United States and elsewhere. Tr. at 19, 51-52. [7] PNB was one among several banks serving as an official depository of the Philippine Government. Tr. at 51-52. [8]

The Philippine Center branch of PNB offered a variety of services both to the Consulate and its staff

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7. The Philippines and the City dispute whether the Bank also provided payroll services to the Consulate, *see* Def. 56.1 at P 38; Pl. Counter-56.1 - Philippines at P 38, and "administered government-approved budgets and transfers of funds from the Philippine government in Manila to the Consulate, UN Mission, other government offices in the building, and the Philippine Embassy in Washington, D.C.," *see* Def. 56.1 at P 37; Pl. Counter-56.1 - Philippines at P 37.

8. A different bank, the Bangko Sentral ng Pilipinas, serves as the central bank of the Philippines. *See* Website of the Bangko Sentral ng Pilipinas, Ex. 58 to Rep. Low-Beer Decl. - Philippines.

and to members of the New York-area Filipino community. Tr. at 11. The bulk of the Bank's activities involved transferring funds from Filipinos in New York to their friends and relatives in the Philippines. Tr. at 11. Additionally, the Bank offered loans both to Philippine Government entities, including the Philippine Consulate General, and, on at least three occasions, to small private businesses. Tr. at 20, 24, 41. The Bank offered basic checking and saving accounts, although the total sums contained in those accounts were far lower than the sums contained in Government accounts. *See* Tr. at 21-22; Financial Statement of Philippine National Bank, 1989, Ex. to Letter from John J.P. Howley to the Court, dated Sept. 27, 2007 ("Howley Letter"). The Bank also provided "settling loans" to Filipino recipients of H-1 visas upon their arrival in the United States. Tr. at 22-23. The Bank's records indicate that by far the largest number of loans issued were to Filipino nationals working as nurses. *See* Print-Out of All Loans Issued by Philippine National Bank, New York Branch, 1987 to 1995, Ex. to Howley Letter.

The Bank had a small brass plaque on the outside of the Philippine Center; at one point the Bank expressed interest in posting a larger advertisement but never did so. Tr. at 31, 59. The Bank was open at times the consular offices and other government entities in the Philippine Center were closed, for example, on Saturdays. Tr. at 73-74. [9]

9. The Philippines claims, based on a declaration of Gavino Abaya, Jr., the current Manager of the Philippine Center and an employee, during the relevant time period, of the Philippine

(Cont'd)

Appendix C

The Airline: From 1974 to 1988, Philippine Airlines ("PAL" or the "Airline") occupied an office on the fourth floor of the Philippine Center. Joint Statement at P 52. As of January 1, 1988, PAL paid annual rent for this space in the amount of $ 49,650. *Id.* at P 53. According to a Philippine Center document dated February 19, 1975, PAL utilized this space "for administrative and outside promotion contacts." PAL had a separate ticketing office at Rockefeller Centre. *Id.* at P 54. This ticket office was temporarily located in the Philippine Center. Correspondence, Ex. 42 to Low-Beer Decl. - Philippines. PAL did not advertise its Philippine Center office on signs inside or outside the building, and the only individuals permitted to enter the office freely were Philippine Center staff. Tr. at 93; Abaya Decl. at P 17, Ex. 1 to Pl. Motion for Summ. J. [10]

(Cont'd)
Mission to the United Nations, that "[t]he presence of PNB within the Philippine Center facilitated the coordination of the government's programs to stimulate investmentand development in the Philippines, as the bankers were immediately available to the special trade representatives and other government officers." Decl. of Gavino Abaya at P 11, Ex. 1 to Pl. Motion for Summ. J. But neither Abaya nor the Philippines has provided any admissible evidence to support this speculative and conclusory assertion, and the Bank's General Manager made no mention of it in the September 17 hearing.

10. The Philippines' 56.1 Statement makes a number of other claims pertaining to PAL, but none of them qualifies as a genuinely undisputed fact supported by admissible evidence. For example, the Philippines claims that the Philippine Government owned PAL during the time of its tenancy in the
(Cont'd)

Appendix C

Against the foregoing factual background, the Philippines argues that the portions of the Philippine Center used to house the restaurant, the bank branch, and the airline office should be exempt from taxation, not only under the VCCR, the VCDR, and the *Republic of Argentina* case, but also under *section 418* of the New York Real Property Tax Law ("RPTL"). That section

(Cont'd)

Philippine Center. Def. 56.1 at P 44. As the City notes, however, the "History of PAL" posted on the Philippine Airlines' website directly contradicts this statement. *See* "Milestones in the History of PAL," *at* http://www.philippineairlines.com, Ex. 38 to Low-Beer Decl. - Philippines (stating that in January 1965 the "Government relinquishes control of PAL" and an individual "acquires a majority stake in the airline," and that in November 1977 the "Government reassumes control of PAL"). The Philippines also presents as a fact Abaya's statement that the PAL office was located near the Philippine Government's Tourism and Trade Representatives "in order to promote trade, investment and tourism with the Philippines." Abaya Decl. at P 16, Ex. 1 to Pl. Motion for Summ. J.; *see also* Def. 56.1 at PP 45-46. But there is no suggestion that Abaya had the slightest personal knowledge to support this conclusory statement, and it therefore is not properly before the Court on these cross-motions. Similarly, Abaya's Declaration states that the PAL office "was accessory to and in support of the governmental activities of the Mission, the Consulate and the Embassy in Washington, D.C. in that it provided secure travel arrangements for the Philippine First Family and other senior government officials and diplomats (acting as the equivalent of White House Travel Office/Air Force One)"; but when asked about the First Family's travel on PAL in his deposition, Abaya stated that "I have no knowledge of that." Abaya Dep., Ex. 60 to Low-Beer Rep. Decl. - Philippines.

exempts from taxation property owned by a foreign government and "used exclusively for the purposes of maintaining offices" for that country's "principal resident representative or resident representative with the rank of ambassador or minister plenipotentiary of such foreign government to the United Nations or other such world-wide international organization," or for "offices for the staff of such representatives." On its face, this section would seem directly to contradict the Philippine's position, since it exempts only property used "exclusively" as "offices" of the permanent representative to the United Nations or that person's staff. But the Philippines argues that it should not be read literally. For example, it argues that "exclusively" should be read, *mirabile dictu*, to mean "primarily." While New York courts are not wholly immune to such legerdemain, *see Ass'n of the Bar v. Lewisohn, 34 N.Y.2d 143, 153, 313 N.E.2d 30, 356 N.Y.S.2d 555 (N.Y. 1974)*, this Court will not assume, absent a direct holding by a New York court, that when the New York legislature used the word "exclusively" in *section 418*, it did not mean what it said.[11]

The Court likewise rejects the Philippines' argument (also made by India and Mongolia) that

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11. While the Philippines also argues that *section 418* was somehow intended, despite its literal language, to extend tax exemption to the fullest limit permitted by international law, that interpretation, besides being contrary to elementary rules of statutory construction, would not extend the exemption beyond limits set by the now applicable treaty law, the VCCR and the VCDR.

Republic of Argentina supplies an independent source of tax exemption, since, as previously discussed, that decision, which preceded ratification of the VCCR, cannot establish, under the rubric of "customary international law," a tax exemption that is not found in the treaties that now more specifically address the issue, the VCCR and the VCDR.

The Court therefore turns to consideration of those two Conventions. As previously discussed, these treaties directly address the issue of which residences are exempt from taxation. By contrast, however, they do not directly address the tax status of the premises at issue in the case of the Philippine Center. Instead, they simply specify that tax exemptions apply to portions of the consular premises "used exclusively for the purposes of the consular post," VCCR art. 1(j), and mission premises "used for the purposes of the mission," VCDR Art 1(i).

Since the Philippine Center operated both as a consulate and as a U.N. Mission, both the VCCR and the VCDR must be examined; but here there are important differences between the two. The VCCR in effect defines the purposes of a consular post broadly, by reference to its functions, i.e., "furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State," "protecting in the receiving State the interests of the sending State and of its nationals," "ascertaining . . . conditions and developments in the commercial, economic, cultural and scientific life of the receiving state, reporting thereon to the Government of the sending state," and "helping and assisting

nationals, both individuals and bodies corporate, of the sending State." VCCR art. 5(a), (b), (c) & (e). Consulates also take care of a number of administrative matters, such as issuing passports and travel documents and acting as a notary, and safeguard the legal rights of nationals of the sending state by, for example, arranging legal representation, protecting minors, and assisting the crews of vessels and aircraft. *Id.* art. 5(d), (f), (h), (i), (l).

However, precisely perhaps because such functions or purposes are so broadly defined, the VCCR limits tax exemption to those portions of the consular premises used "exclusively" for these purposes. *Id.* art. 32. By contrast, the modifier "exclusively" is absent from the corresponding provision of the VCDR; but that may be because the VCDR limits the tax exemption to portions of the property used for the purposes of the mission (in this case, the Mission to the United Nations), which are traditionally much more limited than consular functions.

With respect to the Bank, it is true that the branch provided some banking services to the Philippine Government and to the Consulate specifically, that it acted as an official depository of the Philippine Government, and that it may have provided payroll services to the Consulate and transferred funds between the Philippine Government and the Consulate. [12] But the fact that a commercial entity happens to render services to a consulate in the latter's fulfillment of its functions does not mean that the entity itself is exercising consular

12. As noted, the evidence of these last purported functions is disputed.

functions. *See* VCCR art. 3. Otherwise, any phone company that ran a line through a consulate could be said to be exercising consular functions, which is absurd.[13]

In any event, the Bank did not "exclusively" serve the Consulate or the Philippine Government. Indeed, the General Manager of the Bank testified that the "bulk" of the Bank's activities on the premises consisted of assisting individual Filipino customers in New York in sending personal remittances to the Philippines. Tr. at 11. In that same vein, by far the greatest number of loans provided by the Bank were to Filipino nationals in the United States. Although these services undoubtedly "assist[ed] . . . nationals . . . of the sending state," this was assistance provided by the Bank to the Bank's customers because they were the bank's customers, not assistance provided by the consulate to nationals of the sending state because they were such nationals.

The Management Board's own dealings with PNB make evident that the Philippine Center considered PNB essentially a commercial tenant. Thus, the Center charged PNB rent to occupy the cellar space at a rate both parties understood to reflect the property's market value. Furthermore, during the period following the

13. While the Philippines also claims that the Bank partnered with the Philippine trade representative and other officers to carry out the consular functions of promoting "trade and investment," *see* Def. Mem. of Law at 19, it offers no admissible evidence to support this conclusion.

expiration of the original lease, the parties engaged in an extended dispute over the rent PNB owed, a dispute which continued for several years following PNB's departure from the premises. So intractable were the parties' differences over the amount of rent owed that PCMB ultimately referred PNB to a collection agency. Such conduct is simply inconsistent with the idea that PCMB leased the space to the Bank not as a commercial tenant but in order to serve "the purposes of the consular post."

There are additional indications that PCMB considered the Bank to be an entity separate from the Consulate itself. Thus, the rental agreement itself provided that the Bank would pay all real estate taxes assessed in the future; such real estate taxes would only become due if the property were outside the exempt "consular premises." Also, the Embassy of the Philippines, in a Diplomatic Note to the United States Department of State, requested permission to rent the cellar space to PNB "for its normal banking activities." Diplomatic Note No. 0080487 (Apr. 7, 1987), Ex. 24 to Low-Beer Decl.-Philippines. The Embassy informed the State Department that the portion of the property to be leased to the Bank was "for all intents and purposes . . . a separate unit" and therefore requested whether the Embassy could "proceed with the lease and maintain the immunity of the *rest of the building*." *Id.* (emphasis added). Presumably, the Philippines' Embassy was referring to Article 31 of the VCCR, which grants inviolability to "consular premises." The Diplomatic Note therefore reflects the Embassy's position that

once the property was leased to the Bank, it would no longer form part of the "consular premises."

In short, while it was no doubt beneficial to the Consulate to have the PNB branch located within the Philippine Center, that fact is far from establishing that the Bank "exclusively . . . [served] the purposes of the consular post." [14] Accordingly, the VCCR does not extend tax exemption to the property leased by the Bank.

As for the VCDR, in order for the Bank to enjoy exemption under that convention, the Bank office would have to be used "for the purposes of the mission" — here, the diplomatic purposes of the Philippines' Mission to the United Nations. The Philippines has advanced no basis on which the Bank plausibly could be seen to serve such purposes, as opposed to consular purposes.

The Airline, like the Bank, was a commercial tenant whose presence in the Philippine Center was convenient for the Philippines, but whose office was not part of the "consular premises." Like the Bank, the Airline provided some services to the Consulate and to the Philippine Government, and some of these may have had the effect of promoting travel to the Philippines. On the Philippines' own submission, however, the PAL office in the Philippine Center essentially functioned as a back

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14. For example, it might be convenient for the Consulate to have a shoe repair establishment in the building, or a coffee shop, but presumably a state could not plausibly argue that such ventures were part of the consular premises.

office and generally supported the Airline's primary commercial mission; it therefore makes sense that PAL paid the PCMB rent for the privilege of maintaining an office for this purpose. For the same reasons as the Bank, therefore, the Airline office was not used exclusively for consular purposes.

Similarly, the Philippines has adduced no reason why the PAL office could be said to serve the diplomatic purposes of the Mission to the United Nations. It may also be noted that the U.S. State Department, in a Diplomatic Note sent from the State Department to all Permanent Missions to the United Nations, expressly stated that portions of a United Nations Mission building occupied by "the offices of the national airline [or] other government corporations of a commercial nature" are not tax-exempt. Diplomatic Note No. HC-12-01 (April 5, 2001), Ex. 47 to Low-Beer Decl.-Philippines.

Maharlika Restaurant, however, differs from the PNB branch and the PAL office in several critical respects. To begin with, it was clear from the outset that Maharlika was not intended to be a commercial venture. Neither ABV nor Sulo ever paid rent to the Philippine Center, and, indeed, the lease agreements with both entities specified that the Management Board's purpose was to operate a restaurant to showcase Filipino culture, not to earn a profit. [15] Essentially, the Management Board arranged with ABV and Sulo to operate a

15. It is true that following the termination of the ABV Agreement, and to a lesser extent following the Sulo Agreement, (Cont'd)

restaurant in the Philippine Center that the Management Board had established for its own purposes. A variety of other evidence further supports this conclusion: for example, the Restaurant had only Filipino employees, presented a single long dinner show, and occasionally had to cancel patrons' reservations so that Philippine officials could host functions, when all of these arguably decreased the entity's profitability. *See* PWC Letter at PMB 0028-29. The Philippines also retained various mechanisms of controlling the Restaurant to ensure that it served its desired purpose, such as the right of inspection and a requirement that the Restaurant implement practicable suggestions by the Philippine Commercial Attache. In other words, unlike the PNB branch and the PAL office, which functioned more or less as a bank and an airline whose offices happened to be in the Philippine Center, Maharlika functioned like a Philippine Center restaurant that ABV and Sulo happened to run. Maharlika was thus used exclusively for a consular purpose, and so is exempt under the VCCR.

For the foregoing reasons, the Court grants summary judgment to the Philippines dismissing the

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the parties seem to have engaged in a dispute over the financial obligations of the parties. But such a dispute is not inconsistent with the idea that the Management Board entered into contracts with the companies essentially to operate the consulate's restaurant. And the fact that the Management Board intended to charge Sulo rent on any further renewal of its lease indicates, at most, that the Management Board contemplated changing Maharlika's mission from the role it played since its inception.

Appendix C

City's claims for taxes premised on the portion of the premises occupied by the restaurant Maharlika, and dismiss the corresponding City motion. In all other respects, however, the Court grants the City's motions for summary judgment validating the liens and assessing taxes against the Philippines, India, and Mongolia, and dismisses the defendants' corresponding motions. Counsel for the City should submit to the Court by no later than February 13, 2008 a letter setting forth the amounts due to the City as a result of these rulings, including the specification of any interest due through February 21, 2008. Defendants should submit to the Court by no later than February 19, 2008, a letter specifying any objections to the calculations. The Court will then enter Final Judgment on February 21, 2008.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York

February 8, 2008

179

No. 10-627

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE CITY OF NEW YORK,

Petitioner,

v.

THE PERMANENT MISSION OF INDIA TO THE UNITED STATES and THE BAYARYN JARGALSAIKHAN, as principal resident representative to the United Nations of the Mongolian People's Republic,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	4
A. Factual Background	4
1. The real property taxes in dispute	4
2. The FMA	5
3. The Secretary's July 2, 2009 Notice	6
B. The Decision Below	7
1. The scope of the term "benefit"	7
2. The Secretary's authority to preempt state tax law	9
3. The Secretary's authority to confer a retroactive tax exemption	10
REASONS FOR DENYING THE PETITION	11
I. THE SECOND CIRCUIT APPLIED THIS COURT'S PREEMPTION PRINCIPLES	11

Table of Contents

Page

II. WHETHER THE SECRETARY'S NOTICE "CREATED" A "NEW" BENEFIT RATHER THAN "DESIGNATING" AN "EXISTING" BENEFIT DOES NOT WARRANT THIS COURT'S REVIEW 16

A. The FMA Authorizes the Secretary to "Designate" Tax Exemptions as a "Benefit" 16

B. The Second Circuit's Interpretation of the Foreign Missions Act Has Limited Impact 20

III. THE SECOND CIRCUIT PROPERLY APPLIED THIS COURT'S RETROACTIVITY PRECEDENT IN HOLDING THAT THE SECRETARY HAD THE AUTHORITY TO GRANT THE MISSIONS EXEMPTIONS WITH RESPECT TO UNPAID TAXES 21

CONCLUSION 25

TABLE OF CITED AUTHORITIES

Page

CASES

Altria Group, Inc. v. Good,
129 S. Ct. 538 (2008) 12

Am. Ins. Ass'n v. Garamendi,
539 U.S. 396 (2003) 3

Barclays Bank PLC v. Franchise Tax Bd. of California,
512 U.S. 298 (1994) 15, 16

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 21, 22

INS v. St. Cyr,
533 U.S. 289 (2001) 21

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 22

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007) 19

Okla. Tax Comm'n v. Chikasaw Nation,
515 U.S. 450 (1995) 19

Pa. Dep't of Corr. v. Yeskey,
524 U.S. 206 (1998) 19

Cited Authorities

	Page
Palestine Info. Office v. Shultz, 853 F.2d 932 (D.C. Cir. 1988)	3
Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193 (2007)	4
Republic of Austria v. Altmann, 541 U.S. 677 (2004)	22, 23, 24
Republic of Iraq v. Beaty, 129 S. Ct. 2183 (2009)	21
Sprietsma v. Mercury Marine, 537 U.S. 51 (2002)	19
Toll v. Moreno, 458 U.S. 1 (1982)	14
United States v. County of Arlington, 702 F.2d 485 (4th Cir. 1983)	18
Wyeth v. Levine, 129 S. Ct. 1187 (2009)	12, 15
STATUTES	
22 U.S.C. § 254a, *et seq.*	20
22 U.S.C. § 254c	20

Cited Authorities

	Page
22 U.S.C. § 254d	20
22 U.S.C. § 4301(b)	5
22 U.S.C. § 4301(c)	17
22 U.S.C. § 4301, *et seq.*	1
22 U.S.C. § 4302	2
22 U.S.C. § 4302(a)(1)	*passim*
22 U.S.C. § 4302(b)	5, 17
22 U.S.C. § 4303(2)	5
22 U.S.C. § 4303(5)	5
22 U.S.C. § 4304(b)	17
22 U.S.C. § 4307	9, 13, 14, 15
22 U.S.C. § 4308(g)	5
28 U.S.C. § 1602, *et seq.*	4

OTHER AUTHORITIES

Designation and Determination under the Foreign Missions Act, 74 Fed. Reg. 31788 (July 2, 2009) 6, 7, 17, 22

Cited Authorities

	Page
Diplomatic Note 06-01 (Apr. 12, 2006)	18
Exec. Order No. 12101, 43 Fed. Reg. 54195 (Nov. 17, 1978), *as amended by* Exec. Order No. 12608, 52 Fed. Reg. 34617 (Sept. 9, 1987)	20
Public Notice 975: Property Owned by Diplomatic Mission and Used to House the Staff of Those Missions is Exempt from General Property Taxes, 51 Fed. Reg. 27303 (July 30, 1986)	18
S. Rep. No. 97-329 (Apr. 8, 1982)	17
Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77	2, 18
Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227	2, 18

INTRODUCTION

There is nothing about the narrow decision below that warrants this Court's review. The Second Circuit Court of Appeals engaged in ordinary statutory construction of the terms of the Foreign Missions Act ("FMA"), 22 U.S.C. § 4301, *et seq.*, and applied this Court's precedent on preemption and retroactivity in light of the language, structure and purpose of the FMA. Accordingly, the petition for a writ of certiorari ("Petition" or "Pet.") filed by The City of New York (the "City") should be denied.

The preemption question presented by the City for resolution (Pet., pt. I, at 17) wrongly suggests that the FMA is silent on the authority of the Secretary of State (the "Secretary") to preempt local tax laws and that the Second Circuit deferred to the Secretary's determination of her own preemptive powers. In fact, the FMA is not silent and the Second Circuit did not defer to the Secretary. To the contrary, the Second Circuit, without any deference, read the section of the FMA that is expressly labeled "Preemption" as recognizing the Secretary's authority to preempt local property taxes on residential property owned by foreign missions. Thus, this case does not provide the Court with reason or opportunity to revisit the law of preemption. If this Court were to grant the Petition, the Court would, on the merits, merely need to review the Second Circuit's interpretation of the unambiguous preemption provision of the FMA.

The second issue advanced by the City for this Court's consideration (Pet., pt. II, at 26) likewise presents an ordinary question of statutory interpretation. The City attempted unsuccessfully to persuade the Second Circuit

that the term "benefit" in § 4302 of the FMA should be read, counter-intuitively, to encompass only restrictions on foreign missions, thereby excluding positive benefits for foreign missions such as property tax exemptions. The City now takes a new tack, arguing, for the first time, that the term "designated" in § 4302 should be read narrowly to exclude a tax exemption which, in the City's lexicon, would have to be "created" or "invented," not "designated." Even if the City's new argument were properly raised at this juncture -- which it is not -- the argument would be without merit. The contrived distinction between "designating" benefits and "creating" benefits, as the City would apply it in this case, is utterly arbitrary.

Tax exemptions for foreign missions in the United States are most certainly not new. There is no dispute that foreign government-owned residences for the staffs of bilateral diplomatic missions to the United States and the offices of diplomatic missions to the United Nations are exempt from local property taxes. In fact, this case began as a dispute as to whether the tax exemption that is expressly afforded to mission "premises," pursuant to the Vienna Convention on Diplomatic Relations ("VCDR"), Apr. 18, 1961, 23 U.S.T. 3227, and the Vienna Convention on Consular Relations ("VCCR"), Apr. 24, 1963, 21 U.S.T. 77, encompasses not only the offices of Respondents' U.N. missions but also the diplomatic residences in the same buildings. The Secretary's resolution of the dispute by "designating" property tax exemptions as a "benefit" that is applicable to the diplomatic residences in question plainly does not require the "creation" of a new benefit "out of whole cloth" as the City asserts.

The third question posed by the City (Pet., pt. III, at 38) suggests that the Second Circuit "depart[ed] from this Court's clear precedent" regarding retroactivity in upholding the Secretary's nullification of existing tax liens. But this question also boils down to an ordinary question of statutory interpretation: whether the Second Circuit correctly read the language, structure and purpose of the FMA as authorizing the Secretary to designate as a "benefit" an exemption from prior years' taxes. Moreover, the Second Circuit itself characterized its holding as "narrow."

Even if the Court were inclined to revisit its preemption and retroactivity jurisprudence, this is not the case in which to do so. In the FMA, Congress delegates broad discretionary authority to the Secretary in the area of foreign affairs, an area in which the federal government's supremacy over local government action is paramount. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14 (2003); *Palestine Info. Office v. Shultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) ("When exercising its supervisory function over foreign missions, the State Department acts at the apex of its power. Because it has been accorded express authority from Congress to act in this area, it wields the combined power of both the executive and legislative branches.").

In sum, the City has failed to advance any "compelling reasons" for this Court to review the decision below. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

1. The real property taxes in dispute

The Government of India owns the twenty-six story building located at 235 East 43rd Street, New York, New York. (3a).[1] The building contains the diplomatic offices of India's Permanent Mission to the United Nations (the "India Mission") and rent free residences for the diplomats and staff who serve the Mission and India's New York City consulate. (3a-4a).

Mongolia owns the six-story building at 6 East 77th Street, New York, New York. (4a). The building contains Mongolia's Permanent Mission to the United Nations (the "Mongolia Mission"), an apartment for the Ambassador, and rent free residences for other employees of the Mission. (4a).

The India Mission and the Mongolia Mission (collectively the "Missions") have long maintained that their buildings are exempt from taxation under the VCDR and the VCCR. (53a).[2] Even though housing the Missions'

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1. Reference is to the Appendix to the City's Petition.

2. This Court previously resolved a threshold jurisdictional issue when Respondents argued that the City's case should be dismissed under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602, *et seq.* The Court held that the district court had subject matter jurisdiction under the FSIA exception from immunity for cases involving "rights in immovable property." *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193 (2007). The merits of the City's tax claim, including whether Respondents' Missions are exempt from taxation, remained to be resolved after remand.

staffs in immediate proximity to the Missions' offices is integral to the way the Missions function (54a-55a), the City maintains that only the portions of the buildings occupied by the diplomatic offices of the Missions are exempt from real property taxes. (4a). The City claims that the Governments of India and Mongolia owe the City taxes and interest (at an annual rate of 18%) which, when the district court entered judgment in March 2008, already totaled over $42 million and $4 million, respectively. (75a).

2. The FMA

In 1982, Congress enacted the FMA "to support the secure and efficient operation of United States missions abroad, to facilitate the secure and efficient operation in the United States of foreign missions" and "to assist in obtaining appropriate benefits, privileges, and immunities for [foreign] missions." 22 U.S.C. § 4301(b). The FMA grants the Secretary broad discretion in carrying out Congress's mandate. The FMA authorizes the Secretary, *inter alia*, to "[p]rovide or assist in the provision of *benefits* for or on behalf of a foreign mission" and to "[p]erform such other functions as the Secretary may determine [are] necessary in furtherance of the policy of this chapter." *Id.* § 4303(2), (5) (emphasis added). The statute defines "benefit" expansively to include various enumerated categories of benefits as well as "such other benefits as the Secretary may designate." *Id.* § 4302(a)(1). The statute commits "[d]eterminations with respect to the meaning and applicability" of the statutory terms -- including "benefit" -- "to the discretion of the Secretary." *Id.* § 4302(b). The FMA further provides that "[e]xcept as otherwise provided, any determination required under this chapter shall be committed to the discretion of the Secretary." *Id.* § 4308(g).

3. The Secretary's July 2, 2009 Notice

On July 2, 2009, pursuant to her broad authority under and in furtherance of the stated policy goals of the FMA, the Secretary issued a notice ("Notice") "designat[ing] exemption from real property taxes on property owned by foreign governments and used to house staff of permanent missions to the United Nations . . . as a benefit for purposes of the [FMA]." *Designation and Determination under the Foreign Missions Act*, 74 Fed. Reg. 31788 (July 2, 2009). In taking this action, the Secretary observed that immunity for mission-owned staff housing was "in accord with the tax treatment of foreign government-owned property in the United States used as residences for staff of bilateral diplomatic missions . . . and conforms to the general practice abroad of exempting government-owned property used for bilateral or multilateral diplomatic and consular mission housing." *Id.*

As the Notice further explains, the Secretary determined that her action was

> necessary to facilitate relations between the United States and foreign states, to protect the interests of the United States, to allow for a more cost effective approach to obtaining benefits for U.S. missions abroad, and to assist in resolving a dispute affecting U.S. interests and involving foreign governments which assert that international law requires the exemption from taxation of such diplomatic and consular properties.

Id. The Secretary identified the dispute as "a major irritant in the United States' bilateral relations" that "threatens to cost the United States hundreds of millions of dollars in reciprocal taxation." *Id.*

The real property exemption designated by the Secretary applies, by its terms, to "taxes that have been or will be assessed" on the subject properties and operated "to nullify any existing tax liens." *Id.* The exemption specifically did not "require refund of any taxes previously paid by any foreign government regarding such property." *Id.*

B. The Decision Below

The Secretary issued the Notice shortly before this case was scheduled for argument before the Second Circuit, and the Department of Justice filed an *amicus curiae* brief to bring the Notice to the court's attention. The City submitted supplemental briefing challenging the Secretary's authority to issue the Notice; the Department of Justice and Respondents then filed briefs responding to the City. Following extensive oral argument, the Second Circuit engaged in a thorough analysis of the issues -- each step of which hinged on the statutory text, purpose and history of the FMA -- and determined that the Notice was a lawful exercise of the Secretary's discretion under the FMA.

1. The scope of the term "benefit"

The Second Circuit first addressed the City's argument that a tax exemption could not be a "benefit" under the FMA because Congress intended the Secretary to use the FMA's "benefits" provisions only "for the purpose of imposing reciprocal *restrictions*, and not for the purpose of 'award[ing] favors to foreign missions by relieving them of their local law obligations.'" (21a). The court concluded, however, that "the broad and open-ended language" of the statutory definition of "benefit," as well as

the other statutory provisions describing the Secretary's power to grant benefits, cannot be reconciled with the City's "technical, narrow, and somewhat counter-intuitive" interpretation of "benefit." (20a-26a).

The court below also pointed out that the FMA's legislative history did not support the City's contention "that Congress intended to establish a limited and technical meaning of 'benefit' that the Notice in this case contravened." (27a). Evidence "that Congress passed the FMA in part to create a reciprocal-sanctions regime" was not, in the court's view, "proof that Congress intended to limit the State Department's authority to designate benefits to this function only." (29a). The Second Circuit found "no evidence that Congress sought to proscribe the State Department from using benefits as 'carrots' rather than as 'sticks' in instances where the State Department believed that doing so would best advance the national interest and improve treatment for United States missions abroad." (*Id.*) The court observed that

> in the context of a statute in which Congress has "expressed a clear intention that the executive branch's authority . . . be broad," and in which Congress gave interpretive authority to the State Department to "avoid conflicting interpretations by . . . courts," it would be improper to read Congress's focus on the use of benefits as restrictions to exclude, implicitly, such other perfectly ordinary uses of "benefits."

(29a-30a) (citations omitted).

The Second Circuit rejected the City's reliance on the principle of *ejusdem generis* as confining the statutory

phrase "and such other benefits as the Secretary may designate," 22 U.S.C. § 4302(a)(1), to "benefits" of the types expressly enumerated in the statute. The court read the words "and such other benefits" as being "structurally separate" from the enumerated benefits, not a mere "catch-all" limited by the preceding examples. (25a-26a).

2. The Secretary's authority to preempt state tax law

The Second Circuit then considered whether the FMA afforded the Secretary authority to mandate a property tax exemption that has the effect of preempting the City's tax laws. The court acknowledged the presumption against preemption that operates when there is doubt as to whether Congress provided an agency with the authority to preempt. (35a). However, the court analyzed the FMA's statutory language, in particular the "Preemption" provision (§ 4307), and held that "[t]he language, structure, and subject matter of the FMA all strongly indicate that Congress meant to give the State Department authority to designate benefits that might conflict with and therefore preempt State and local law." (36a). The court concluded that the "State Department acted within its statutory authority in recognizing a property tax exemption as a benefit that has the effect of preempting the City's inconsistent tax laws." (33a).

The Second Circuit rejected the City's contention that § 4307 precluded preemption of local tax law:

> [S]ection 4307 cannot in its natural meaning be read as describing the FMA's full-preemptive scope, but rather as a savings c[l]ause that insulates certain listed State and municipal

> powers from preemption. As such, section 4307 provides additional support for the conclusion that the State Department has the power to preempt any and all State and local laws that are not specifically protected.

(38a).

3. The Secretary's authority to confer a retroactive tax exemption

Finally, the Second Circuit considered whether Congress granted the State Department authority under the FMA to issue a Notice having a retroactive effect. Again, the Second Circuit acknowledged the general presumption against retroactivity, but, considering the statute as a whole, concluded "that the FMA gave the State Department the power to confer a retroactive tax exemption to foreign missions." (52a). Citing "the FMA's substantial delegation of discretionary authority to the State Department," "the criteria guiding the Secretary's benefit determinations," and "the policies embodied in the statute," the Second Circuit read the FMA to permit the Secretary to exempt diplomatic residences from "taxes that have been . . . assessed" and to "nullify any existing liens." (62a). The court explained that "it would be anomalous to read the FMA as requiring the State Department to resolve disputes involving foreign missions through the designation of benefits, and yet to tie the Department's hands by limiting it to prospective solutions that may not address the sources of the conflicts." (62a-63a).

The Second Circuit noted that it was unlikely that the ongoing tax dispute at issue -- which had, in the words

of the Notice, become a "major irritant in the United States' bilateral relations which threaten[ed] to cost the United States hundreds of millions of dollars" -- "could be effectively resolved by . . . an exemption that was only forward-looking and that left the [Respondents] on the hook for decades of property taxes along with significant back interest payments." (63a). Given that the FMA "was intended to give the State Department flexible tools to carry out United States foreign-policy objectives," the Second Circuit read the FMA as permitting the Secretary to nullify the existing tax liens. (*Id.*)

REASONS FOR DENYING THE PETITION

I. THE SECOND CIRCUIT APPLIED THIS COURT'S PREEMPTION PRINCIPLES.

The City and the Amici Curiae[3] argue that this Court's review is required because, in the face of "the presumption against preemption," the Second Circuit deferred improperly to the Secretary's interpretation of her powers under the FMA in deciding that she had the authority to preempt state tax law. In fact, this case offers no occasion to address the propriety of such deference because the Second Circuit did not defer to the Secretary's interpretation of her own preemptive powers. Rather, applying this Court's teaching on preemption, the Second Circuit found in the FMA a clear expression of Congress's intent to grant broad authority to the Secretary, including the power to preempt local tax laws.

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3. Reference is to the International Municipal Lawyers Association, the National League of Cities and the U.S. Conference of Mayors which filed a joint brief *amici curiae* ("AC Br.") dated Dec. 13, 2010.

Neither the City nor the Amici can identify any language in the decision below suggesting that the Second Circuit was deferring to the Secretary on the subject of preemption. To the contrary, the Second Circuit recognized that determining whether Congress had granted to the State Department the power to preempt local tax laws was "a matter of statutory interpretation." (35a). Consistent with this Court's instructions, the Second Circuit's guiding principle was the "purpose of Congress," which is "the ultimate touchstone in every preemption case." *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009) (citations omitted). Even the City admits that the presumption against preemption is a rule of statutory construction that does not apply if traditional tools of statutory interpretation demonstrate Congress's intent to authorize preemption. (Pet. at 16-17).

In an effort to ascertain Congressional intent, the Second Circuit engaged in a painstaking analysis of the FMA's statutory text, structure, purpose and legislative history -- the very approach the City advocates. *Compare* 36a ("The language, structure, and subject-matter of the FMA all strongly indicate that Congress meant to give the State Department authority to designate benefits that might conflict with and therefore preempt State and local law.") *with* Pet. at 22 ("To determine whether Congress clearly and manifestly intended to authorize agency preemption, courts must consider the language, structure, purpose and history of the relevant federal statute."); *see also Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) ("Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose."). As the Second Circuit found, in the case of the FMA, Congress plainly demonstrated intent to allow the Secretary to preempt local tax laws.

Relying on the language and structure of the FMA, the Second Circuit found that

> [b]y granting the State Department the power to implement an expansive statutory term -- 'benefit' -- and by providing the Department with significant discretionary authorities designed to achieve a foreign affairs objective, the FMA authorizes the Department to take actions that preempt conflicting State or local laws that implicate the Department's supervisory function over foreign missions.

(37a).

The Second Circuit discussed at length § 4307 of the FMA which is expressly entitled "Preemption." (*See* 33a, 37a-42a). Section 4307 provides:

> Nothing in section 4302, 4303, 4304, or 4305 of this title may be construed to preempt any State or municipal law or governmental authority regarding *zoning, land use, health, safety, or welfare*, except that a denial by the Secretary involving a benefit for a foreign mission within the jurisdiction of a particular State or local government shall be controlling.

22 U.S.C. § 4307 (emphasis added). The statutory text thus reflects Congress's intent to impose a limited bar on the preemption of certain state and local laws, in the areas of zoning, land use, health, safety, or welfare. Even in those specified areas, the Secretary can preempt state law provided that she is *denying* benefits. The fact that the

FMA had to spell out very precisely the particular areas in which the Secretary lacks the authority to preempt state law, clearly implies that the Secretary is otherwise empowered to preempt state law. As the Second Circuit stated: "Section 4307 cannot in its natural meaning be read as describing the FMA's full-preemptive scope, but rather as a savings c[l]ause that insulates certain listed State and municipal powers from preemption." (38a).[4]

Although the City characterizes § 4307 generally as prescribing the extent to which the Secretary may preempt "local police powers," the City acknowledges that "local taxing powers" are not mentioned. (Pet. at 32). The Amici nonetheless insist that § 4307 bars preemption where the Secretary confers benefits which conflict with "local police power" and that the power to tax is such a local police power. (AC Br. at 4-6). Hence, the Amici argue, taxation is within the areas in which preemption is barred under § 4307. There is, however, a fundamental flaw in the Amici's syllogism: § 4307 does not use the term "police power." Rather, § 4307 uses the terms "zoning, land use, health, safety, or welfare." Congress would have included taxation among the areas specified in § 4307 if preemption of taxation was to be precluded as well. The Amici's argument is thus inconsistent with the language

4. The dissenting opinion of Justice Rehnquist in *Toll v. Moreno*, 458 U.S. 1, 34-35 n.7 (1982), which the City cites (Pet. at 21), merely quoted a Senator's statement in the Congressional Record in 1945 that his Committee had deleted from proposed legislation language which exempted international organizations from State or local taxes because the Committee "felt that was wholly beyond the power of Congress." Neither the *Toll* opinion nor any authority cited by the City suggests that the Supremacy Clause does not apply to state and local tax laws.

of § 4307 and with the construction canon *expressio unius est exclusio alterius* -- the expression of certain things in a statute necessarily involves exclusion of other things not expressed.

The Second Circuit's analysis is fully consistent with *Wyeth v. Levine*, 129 S. Ct. 1187. In *Wyeth*, the Court found that because Congress had enacted a provision in the Food, Drug, and Cosmetic Act expressly preempting state laws concerning medical devices, Congress's silence as to the continued applicability of state laws concerning prescription drugs demonstrated that Congress did not intend to preempt state law failure-to-warn claims involving prescription drugs. *Id.* at 1200. The *Wyeth* Court stated that "[i]f Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the [Food, Drug, and Cosmetic Act's] 70-year history." *Id.* Here, however, the converse is true: Congress identified specific areas in which preemption would *not* be allowed. The fact that Congress did not list taxes among the areas where there can be no preemption demonstrates that Congress intended to permit the preemption of state and local tax laws.

Barclays Bank PLC v. Franchise Tax Bd. of California, 512 U.S. 298 (1994), which the Amici rely on heavily is not on point. In *Barclays*, the Court addressed whether California's approach to calculating corporate franchise tax violated the Commerce Clause of the Constitution by preventing the Federal Government "from 'speaking with one voice' in international trade." *Id.* at 320 (citations omitted). The Court found that the absence of any Congressional action and repeated failures

of Congress to legislate in the area demonstrated that Congress had indicated implicitly that state taxation methods did not impair federal uniformity. *Id.* at 323-26. The Court made clear, however, that it was not considering what is effectively the issue in the instant case: "the scope of the [executive branch's] power to preempt state law pursuant to authority delegated by statute or a ratified treaty." *Id.* at 329.

Thus, the Second Circuit's preemption analysis was consistent with this Court's precedent, driven by the FMA's text, purpose and history as reflecting Congressional intent and not by deference to the Secretary's interpretation of her preemptive powers. Accordingly, the preemption issue is not worthy of review by this Court.

II. WHETHER THE SECRETARY'S NOTICE "CREATED" A "NEW" BENEFIT RATHER THAN "DESIGNATING" AN "EXISTING" BENEFIT DOES NOT WARRANT THIS COURT'S REVIEW.

A. The FMA Authorizes the Secretary to "Designate" Tax Exemptions as a "Benefit"

The City maintains (Pet. at 26-31) that the Secretary's discretionary authority to "designate" benefits under § 4302(a)(1) of the FMA does not encompass the Secretary's Notice, which the City characterizes as having "created" a "new benefit." In the City's view, the FMA "granted the Secretary authority to regulate foreign missions' access to otherwise available 'benefits,' not the authority to invent preemptive 'benefits' out of whole cloth." (Pet.

at 28). The City's challenge involves a straightforward matter of statutory interpretation involving no doctrinal issue warranting this Court's review. In any event, it is the City's argument that is fabricated out of whole cloth.

Section 4302(a)(1) of the FMA defines "benefit" to include seven categories of benefits which may be acquired by or for a foreign mission in the United States. 22 U.S.C. § 4302(a)(1). Section 4302(a)(1) further defines the term "benefit" to encompass "such other benefits as the Secretary may designate." *Id.* In addition, the FMA commits "[d]eterminations with respect to the meaning and applicability" of the term "benefit" "to the discretion of the Secretary." *Id.* § 4302(b). The FMA's expansive definition of the term "benefit" thus conflicts with the City's argument that the term "designate" should be defined very strictly to exclude the Notice's tax exemption.

Moreover, in light of Congress's expressed intent that the Secretary have the power to bring about reciprocity between the treatment afforded United States missions abroad and foreign missions in the United States (22 U.S.C. §§ 4301(c), 4304(b); S. Rep. No. 97-329 (Apr. 8, 1982)), Congress would not have intended to confine the Secretary to designating preexisting benefits. Indeed, the City admits that Congress intended to give the Secretary flexibility to respond in kind if foreign countries were to "impose imaginative new restrictions" on United States missions. (Pet. at 27). Given the "general practice abroad exempting government-owned property used for bilateral and multilateral diplomatic and consular mission housing" (Notice), the ability of the Secretary to designate such an exemption as a benefit under the FMA is consistent with the statute's language, purpose and Congressional intent.

The City's argument that the tax exemption at issue here was "created," not "designated," is predicated on an entirely arbitrary distinction. The City posits that the term "designate" means "to indicate, specify, or point out," not "to create, bring into being, or cause to exist." (Pet. at 27). From this starting point, the City leaps to the unjustified conclusion that the tax exemption provided for in the Notice was a "new benefit" "created" by the Secretary outside the bounds of her authority under the FMA, not an "otherwise available" benefit that could be "designated" by the Secretary pursuant to the FMA. (*Id.* at 27-28). The City's argument ignores the well established array of property tax exemptions for diplomatic missions that have long existed under international practice, as now codified in the VCDR and VCCR.

Articles 23 of the VCDR and 32 of the VCCR exempt mission (or consular) "premises" from all taxes. Although there is a dispute as to whether the diplomatic residences at issue here are within the mission "premises," the Fourth Circuit Court of Appeals held almost 30 years ago that a mission-owned apartment building used to house embassy personnel was tax exempt mission "premises" under the VCDR. *United States v. County of Arlington, Va.*, 702 F.2d 485 (4th Cir. 1983). Subsequently, the State Department embraced the Fourth Circuit's opinion. *Public Notice 975: Property Owned by Diplomatic Mission and Used to House the Staff of Those Missions is Exempt from General Property Taxes*, 51 Fed. Reg. 27303, 27304 (July 30, 1986); *see also Diplomatic Note* 06-01, at 11 (Apr. 12, 2006), *available at* http://www.state.gov/documents/organization/29922.pdf. While the Fourth Circuit's interpretation did not foreclose the City from litigating the issue here, the Notice has the effect of resolving the dispute by designating -- *i.e.*, "indicat[ing], specify[ing] or

point[ing] out" -- the tax exemption applicable to mission "premises" as a "benefit" that is also applicable to the diplomatic residences in dispute.

In any event, the City's reliance on the meaning of the term "designate" to exclude the tax exemption mandated by the Notice from the "benefits" permitted by the FMA is improper in that the argument was not raised below. Having failed to persuade the Second Circuit to adopt a counter-intuitive definition of the term "benefit" as being limited to sanctions and restrictions, the City has changed its focus to Congress's use of the word "designate." Yet, this Court does not sit to hear arguments that were not raised before or considered by the lower courts. *See, e.g., MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136 (2007); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Okla. Tax Comm'n v. Chikasaw Nation*, 515 U.S. 450, 456-57 (1995) (declining to hear a new statutory interpretation argument raised by petitioner that was not raised below).[5]

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5. There is also no substance to the City's contention that under the canons of *noscitur a sociis* and *ejusdem generis* the mention of "such other benefits as the Secretary may designate" in § 4302(a)(1) is limited to benefits similar to those enumerated in the statute. The City fails to address the Second Circuit's determination that the "'other benefits' part of the definition for 'benefits'" was "a delegation" -- "structurally separate" from the enumerated list of benefits -- and thus not "a general term" that necessarily embraces the same object as the specific benefits identified." (26a). The Second Circuit stated that using such contract interpretation doctrine to restrict the interpretation of the term "benefit" under the FMA "would risk reading judicial limits into a term Congress seems deliberately to have sought to leave open-ended in order to give the State Department flexibility in an area where flexibility is particularly desirable." (25a).

B. The Second Circuit's Interpretation of the Foreign Missions Act Has Limited Impact

Even if the term "benefits" were not broad enough to encompass the tax exemption at issue here, the Secretary had authority to issue the Notice under the Diplomatic Relations Act ("DRA"), 22 U.S.C. § 254a, *et seq.*, which incorporated the VCDR. Pursuant to the DRA, the "President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for the mission . . . which result in more favorable treatment or less favorable treatment than is provided under the [VCDR]." *Id.* § 254c.[6] Consequently, to the extent that there is any question as to whether the VCDR's tax exemption for mission premises extends to the residences at issue, or whether the Secretary has the power to recognize such an exemption as a "benefit" under the FMA, the President retains full authority to afford "more favorable treatment" to the missions per the DRA. Further, once the President has acted, the DRA requires that pending legal actions be dismissed. *Id.* § 254d.

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6. By executive order, the President "designate[d] and empower[ed] the Secretary of State to perform . . . the functions vested or to be vested in the President by [the] Diplomatic Relations Act." Exec. Order No. 12101, 43 Fed. Reg. 54195 (Nov. 17, 1978), *as amended by* Exec. Order No. 12608, 52 Fed. Reg. 34617 (Sept. 9, 1987).

III. THE SECOND CIRCUIT PROPERLY APPLIED THIS COURT'S RETROACTIVITY PRECEDENT IN HOLDING THAT THE SECRETARY HAD THE AUTHORITY TO GRANT THE MISSIONS EXEMPTIONS WITH RESPECT TO UNPAID TAXES.

In upholding the retroactive impact of the Notice, the Second Circuit followed this Court's precedent, looking to the language, structure and legislative history of the FMA in determining that the Secretary had the authority to exempt diplomatic residences from local taxes and to nullify existing tax liens with respect to such residences. In any event, as the Second Circuit itself stated, the retroactivity decision was a "narrow" holding regarding the broad discretion that the FMA grants the Secretary in addressing U.S. relations with foreign countries and the diplomatic missions of those countries in the United States. (61a). Accordingly, this issue does not merit review by this Court.

The City argues (Pet. at 38) that the Second Circuit erred in upholding the Notice because, under *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), the court's sole inquiry here should have been whether the FMA contains an express retroactivity provision. This Court, however, has not applied such a rigid approach to retroactivity. Instead, the Court has considered multiple factors in assessing whether a statute permits retroactive application. *See Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2193-94 (2009) (noting that retroactive effect of President's Congressionally authorized action was consistent with Congress's policy aims and would not disturb settled expectations); *INS v. St. Cyr*, 533 U.S. 289, 321 (2001)

("[T]he judgment whether a particular statute acts retroactively 'should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.'") (citation omitted); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 282-83 (1994) (considering purpose of statute, fairness of retroactive application and fact that impact would fall on private, not public, parties).

Even in *Bowen*, the Court considered "the structure and language of the statute," that the statute at issue "on its face" permitted other "retroactive action," and that the legislative history did not contemplate "retroactive rulemaking." 488 U.S. at 209, 213-14. Moreover, in *Bowen*, unlike in the instant case the burden of retroactive application impacted private parties, not a municipality.[7]

As the Second Circuit recognized, this Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), is particularly instructive here on the issue of retroactivity. *Altmann* concerned an exception to the FSIA which exempted from immunity "cases involving 'rights in property taken in violation of international law.'" *Id.* at 685. In determining that the exception operated retroactively, the Court "examine[d] the entire statute in light of the underlying principles governing our retroactivity jurisprudence." *Id.* at 695 n.15. The Court took account of the fact that the "principal purpose of

7. Notably, this Court subsequently characterized *Bowen* as "a paradigmatic case of retroactivity in which a federal agency sought to recoup . . . funds that had been paid to hospitals for services rendered earlier." *Landgraf*, 511 U.S. at 272. The Secretary's Notice at issue here, by contrast, expressly did "not operate to require refund of any taxes previously paid by any foreign government regarding such property." (Notice).

foreign sovereign immunity" is not to guide foreign states in "shap[ing] their conduct," but rather "reflects current political realities and relationships." *Id.* at 696.

In its decision below, the Second Circuit similarly considered the "values the presumption against retroactivity is designed to serve." (51a). The court stated that because the "State Department Notice implicates only the public rights of States and municipalities, not of private persons, . . . this is manifestly not a case where retroactive lawmaking is being used to burden an unpopular or underrepresented person, group, or entity." (52a). The Second Circuit also concluded that "the Notice does not upset expectations that were genuinely settled." *Id.* Indeed, as the court noted, "[b]oth the India Mission and the Mongolia Mission have consistently taken the position that their entire buildings, including those portions used for staff residences, are tax exempt under the VCCR and the VCDR." (53a).[8]

The Second Circuit thus assessed Congress's intent by examining the language, structure and purpose of the FMA, consistent with Supreme Court precedent. *See Altmann*, 541 U.S. at 692-96. As the court found, Congress delegated substantial discretionary authority to the State Department to enable the Secretary to carry out the FMA's diplomatic goals. (62a). The Second Circuit deemed it "unlikely" that the disagreement between the City and the Respondents "could be effectively resolved by the establishment of an exemption that was only

8. Although the court did not decide Respondents' arguments under the VCCR and VCDR, the Second Circuit did state: "[W]e do think that the Missions' arguments have considerable force." (53a).

forward-looking and that left the Missions on the hook for decades of property taxes along with significant back interest payments." (63a). The court concluded, therefore, that Congress could not have intended to compromise the Secretary's effectiveness by limiting her to prospective solutions that may not fully address the source of international conflict. *Id.* Rather, the Second Circuit determined "that the FMA gave the State Department the power to confer a retroactive tax exemption to foreign missions." (52a).[9]

In sum, the Second Circuit correctly applied this Court's precedent in determining that the FMA empowered the Secretary to issue the Notice. Reviewing the Second Circuit's self-described "narrow" holding (61a), will add nothing to the Supreme Court's body of retroactivity precedent.

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9. While the *Altmann* Court described the context of its decision as being "*sui generis*," 541 U.S. at 696, the fact is that, as in *Altmann*, the Notice is essentially a determination regarding the immunity of foreign sovereigns, rather than a change in substantive law. The Notice eliminates "a major irritant in the United States' bilateral relations" by immunizing foreign sovereigns against claims for taxes that are already owed or would otherwise be owed in the future.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

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IN THE

Supreme Court of the United States

THE CITY OF NEW YORK,

Petitioner,

-against-

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS and THE BAYARYN JARGALSAIKHAN, *as principal resident representative* to the United Nations of the Mongolian People's Republic,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITED AUTHORITIES	iii
ARGUMENT	1
INTRODUCTION	1
A. Federal Agency Preemption of State and Local Tax Laws is an Extraordinary Intrusion on State Sovereignty	1
B. The FMA does not Grant the Secretary Clear Authority to Preempt State and Local Tax Laws	3
1. The FMA's "benefits" provisions do not authorize the Secretary to preempt state and local tax laws	4
2. The FMA's preemption provision does not authorize the Secretary to preempt state and local tax laws	7
3. The FMA's foreign policy subject matter does not give the Secretary carte blanche to preempt state and local law	8

Table of Contents

Page

C. Agency Power to Preempt State and Local Tax Law Retroactively Requires Express Congressional Authorization 9

CONCLUSION 11

TABLE OF CITED AUTHORITIES

Page

CASES

American Insurance Ass'n v. Garamendi,
539 U.S. 396 (2003) 8

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 9

Crosby v. National Foreign Trade Council,
530 U.S. 363 (2000) 8

Department of Revenue v. ACF Indus., Inc.,
510 U.S. 332 (1994) 1

Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta,
458 U.S. 141 (1982) 3

Gonzales v. Oregon,
546 U.S. 243 (2006) 2

Gregory v. Ashcroft,
501 U.S. 452 (1991) 2

Solid Waste Agency v. United States Army Corps of Eng.,
531 U.S. 159 (2001) 2

Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler,
537 U.S. 371 (2003) 5

Cited Authorities

	Page
Zemel v. Rusk, 381 U.S. 1 (1965)	4
Zschernig v. Miller, 389 U.S. 429 (1968)	9
STATUTES	
22 U.S.C. § 4302	4, 5
22 U.S.C. § 4303	4
22 U.S.C. § 4304	4, 5
22 U.S.C. § 4307	6, 7
49 U.S.C. § 11501(b)(3)	2
REGULATIONS	
74 Fed. Reg. 31,788	9
CONGRESSIONAL REPORTS	
House Report No. 97-102, Pt. 1 (Committee on Foreign Affairs, May 19, 1981)	5-6, 7
House Report No. 97-693 (Conference Report, Aug. 3, 1982)	7
Senate Report No. 97-283 (Committee on Foreign Relations, Nov. 30, 1981)	6
Senate Report No. 97-329 (Committee on Governmental Affairs, Apr. 8, 1982)	5, 7

ARGUMENT

Introduction

This case involves an extraordinary assertion of preemptive authority by a federal agency. Acting on the basis of broad, non-specific language in the FMA, the Secretary has prohibited Petitioner from applying its general property tax laws to foreign mission and consular staff housing. Further intruding on local taxing powers, the Secretary imposed the ban retroactively, thereby wiping out Petitioner's nearly $50 million judgment against Respondents, and over $200 million in tax liens and interest. Notably, in his invitation brief, the Solicitor General fails to cite any case upholding agency preemption (let alone retroactive preemption) of a general state or local tax law.

This Court should grant review to resolve the far-reaching federalism issue presented here: whether federal agencies have the power to preempt traditional state taxing powers absent clear (and, with respect to retroactive preemption, explicit) congressional authorization.

A. Federal Agency Preemption of State and Local Tax Laws is an Extraordinary Intrusion on State Sovereignty.

State taxing authority is "central to state sovereignty." *Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 344-45 (1994). Congress respects this principle, and related federalism principles, by preempting state and local tax laws only rarely, and *property* tax laws even less frequently.

This Court never assumes a casual exercise of Congress's "extraordinary power" to interfere with the States' "substantial sovereign powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). Thus, Congress must express its intent to preempt state and local property tax laws in clear, unmistakable terms. *See, e.g.*, 49 U.S.C. § 11501(b)(3) (forbidding excessive rates of state and local "property tax[es] on rail transportation property"). In *ACF*, for example, this Court reasoned that if Congress had intended to restrict state power to provide certain property tax exemptions, it "would have spoken with clarity and precision." 510 U.S. at 344.

Accordingly, one would expect Congress to be extremely cautious about granting federal agencies the "extraordinary power" to preempt state and local property tax laws. *Gregory*, 501 U.S. at 460. Indeed, the Solicitor General provides no examples of federal statutes granting federal agencies broad discretion to eradicate state or local tax laws.

If Congress had intended to depart from usual practice, and grant the Secretary power to preempt state and local property tax laws on behalf of foreign missions, Congress would have expressed that intent clearly. *See Gonzales v. Oregon*, 546 U.S. 243, 274 (2006); *Solid Waste Agency v. United States Army Corps of Eng.*, 531 U.S. 159, 172-73 (2001). The FMA contains no such expression of congressional intent.

B. The FMA does not Grant the Secretary Clear Authority to Preempt State and Local Tax Laws.

Citing *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982), the Solicitor General argues that a statute merely granting a federal agency broad power may authorize agency preemption of state and local tax laws (SG Br. at 9-17). In *De la Cuesta*, however, this Court upheld a preemptive regulation of the Federal Home Loan Bank Board (the "Board") based upon statutory language "plainly indicat[ing]" that "existing state law" would not bind the Board's regulation of federal savings and loans. 458 U.S. at 161-62.[1]

The Solicitor General gives no weight either to the profound federalism implications of his position, or to the importance of taxing powers to the existence, independence and operation of the States (Pet. at 7, 19-21). While Petitioner does not dispute that valid federal laws preempt conflicting state law, regardless of the "relative importance to the State of its own law" (SG Br. at 13-14), that observation is off point here. The question before this Court is whether Congress authorized the Secretary to preempt state and local property tax laws, notwithstanding Congress's historical reluctance to interfere with vital state powers.

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1. This Court held that a Board regulation permitting federal savings and loans to use certain clauses in mortgage contracts preempted contrary California case law. Agreeing with the majority, Justice O'Connor wrote separately to emphasize that nothing in the relevant statute "remotely suggests that Congress intended to permit the Board to displace local laws, such as tax statutes . . . not directly related to savings and loan practices." 458 U.S. at 171-72 (O'Connor, J., concurring).

Far from expressly authorizing the preemption of state and local property tax laws, the FMA does not even mention taxes, and its legislative history makes clear that Congress did not intend to authorize their preemption. As a result, the Solicitor General must try to infer a grant of tax-preemptive powers. That effort is unpersuasive.

1. The FMA's "benefits" provisions do not authorize the Secretary to preempt state and local tax laws.

The FMA's "benefits" provisions, sections 4302(a)(1), 4303(2), and 4304 (a-b), together with its preemption provision, section 4307, achieve Congress's goals by granting the Secretary effective regulatory control over foreign missions' access to otherwise available real property, goods, and services (Pet. at 26-33). Despite admitting that Congress's "primary focus was on reciprocal sanctions," the Solicitor General incorrectly argues that the FMA "benefits" provisions authorize the Secretary to "designate" state and local law property tax exemptions as "benefits" for conferral upon foreign missions (SG Br. at 9-12).

The Solicitor General's expansive interpretation of the FMA has no apparent limit. In his view, the Secretary seemingly enjoys unlimited power to "designate" anything she wishes as a "benefit" for conferral upon foreign missions. Thus, to improve relations with a foreign government, the Secretary presumably could order states and localities to refund property taxes previously paid. Aside from being an implausible view of the statute, the Solicitor General's open-ended reading ignores this Court's rule that foreign affairs statutes do not "grant the Executive totally unrestricted freedom of choice." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

Moreover, the Solicitor General's broad reading of the term "benefit" is inconsistent with the thrust of FMA section 4302(a)(1). *See generally Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003). It would have made no sense for Congress to have listed various "benefits" of relative inconsequence, and nevertheless to have intended, by a broad supplemental phrase, to sweep in an extraordinary "benefit" like immunity from state and local taxes. More sensibly read, the FMA allows the Secretary only to designate, as benefits, the acquisition of items somehow proportionate to the real property, goods, and services enumerated in section 4302(a)(1) (Pet. at 30).

Misconstruing FMA section 4304, the Solicitor General further asserts that the Secretary may provide preemptive "benefits" in order to "advance certain enumerated foreign relations goals," such as the resolution of disputes between the United States and a foreign government (SG Br. at 2, 10, 15, 17, 20, 22). This assertion elides the statutory distinction between providing requested "benefits" on specified terms and conditions (section 4304[a]), and restricting "benefits" based upon the criteria enumerated in section 4304(b).

Upon the request of a foreign mission, FMA section 4304(a) authorizes the Secretary to provide "benefits" to foreign missions, such as customs and importation services (see Pet. at 29), upon specified terms and conditions. Section 4304(b) authorizes the Secretary "to impose substantive and procedural *constraints* on the basis of reciprocity or otherwise, in accordance with" enumerated criteria, including the need to resolve a dispute. Senate Rep. No. 97-329 at 9 (emphasis added); *see also* House Rep.

No. 97-102, Pt. 1, at 32 (same). Nothing in section 4304 authorizes the Secretary to provide – let alone create and confer – benefits in order to resolve disputes with foreign governments.

The Solicitor General's expansive interpretation of the FMA "benefits" provisions is also inconsistent with his own interpretation of the FMA preemption provision, section 4307. The Solicitor General concedes that under section 4307, the Secretary may only encroach upon local police power by *denying* benefits (SG Br. at 14). But if Congress had intended to authorize the Secretary to exempt foreign missions from state and local laws, Congress would not have explicitly protected such a large body of state and local laws from affirmative preemption.

Finally, the Solicitor General misconstrues FMA section 4301(c), which directs the Secretary to determine the "treatment" accorded to a foreign mission after "due consideration" of (1) "the benefits, privileges, and immunities provided" to United States missions in the relevant foreign country; and (2) the protection of United States interests. Rather than authorizing the Secretary to create state and local law exemptions (SG Br. at 1-2, 9-13, 15, 17), section 4301(c) is merely a policy statement making reciprocity "a key feature of the system" the FMA envisions. *See* Senate Rep. No. 97-283 at 5; House Rep. No. 97-102, Pt. 1, at 29.

2. **The FMA's preemption provision does not authorize the Secretary to preempt state and local tax laws.**

FMA section 4307 dovetails with the FMA's "benefits" provisions, and respects local autonomy, by authorizing the Secretary to preempt state and local police powers only negatively, *i.e*, by denying benefits (Pet. at 31-33). From the absence of any reference to state and local tax laws in section 4307, the Solicitor General attempts to infer that Congress granted the Secretary authority to preempt them (SG Br. at 14-15). The Solicitor General's argument ignores this Court's contrary precedent (Pet. at 31-33).

Moreover, the FMA legislative history supports Petitioner's interpretation of section 4307. The original House and Senate bills contained a broader preemption provision. Senate Rep. No. 97-329 at 32; House Rep. No. 97-102, Pt. 1, at 62. Disclaiming any intention to preempt "affirmatively," the State Department represented to Congress that it construed the original provision as having no effect on state and local law, except "that the Secretary . . . may disqualify a foreign government from obtaining or retaining official facilities." *See* Senate Rep. No. 97-329 at 5, 17.

Accordingly, Congress narrowed the preemption provision to its present form. *See* House Rep. No. 97-693 at 40. This "limited" preemption provision, the House/Senate Conference Report states, expresses "the preemptive effect" of the Secretary's right "to preclude the acquisition of any benefits by a foreign mission[,]" and renders the Secretary's denial of benefits "controlling." *Id.* at 43. "The principal impact" of section 4307 "is to preclude [a foreign

mission's] reliance on local law . . . in an effort to secure benefits contrary to limitations imposed by the Secretary." *Id.* Section 4307, the Conference Report confirms, "*does not otherwise affect State or local law or regulations . . .* ." *Id.* (emphasis added).

This legislative history refutes any reading of section 4307 as allowing the Secretary to create, and confer upon foreign missions, preemptive exemptions from state and local tax laws.

3. The FMA's foreign policy subject matter does not give the Secretary carte blanche to preempt state and local law.

To overcome the absence of "affirmative" preemptive authority in the FMA, the Solicitor General argues that because the FMA involves foreign affairs, Congress must have intended to grant the Secretary broad power to preempt state and local laws (SG Br. at 13-14, 20, 22). To the contrary, as noted above (at page 6), Congress explicitly limited the Secretary's preemptive authority in FMA section 4307.

The Solicitor General misplaces reliance upon *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), and *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (SG Br. at 13, 20). In *Garamendi*, this Court held that executive claims-settlement agreements preempted a California law requiring insurance companies to disclose information about Nazi-era European insurance policies. In *Crosby*, this Court held that a federal statute preempted a Massachusetts law barring state entities from buying goods or services

from companies doing business with Burma. Neither case suggests that foreign affairs statutes implicitly authorize the Secretary to preempt generally-applicable state and local laws – let alone state and local property tax laws allowed under the Vienna Conventions (App. 82a-85a). *Cf. Zschernig v. Miller*, 389 U.S. 429, 443 (1968) (Stewart, J., and Brennan, J., concurring) ("the basic allocation of power between the States and the Nation . . . cannot vary . . . with the shifting winds at the State Department").

C. Agency Power to Preempt State and Local Tax Law Retroactively Requires Express Congressional Authorization.

Beyond asserting the extraordinary power to preempt state and local tax laws, the Secretary claims the additional right, under the FMA, to do so retroactively. 74 Fed. Reg. 31,788. Because "the FMA does not contain . . . express authorization for the State Department to issue a [retroactive] rule" (App. 62a), this Court's precedent invalidates the retroactive portion of the Notice (Pet. at 38-40).

The Solicitor General fails to cite any case upholding a federal agency's retroactive preemption of state or local law without explicit congressional authorization (SG Br. at 21-22). There is no authority for the Solicitor General's assertion that because the Notice supposedly avoids impairing vested rights or upsetting settled expectations (which is, at any rate, incorrect, see Pet. at 7-8), the Secretary may promulgate retroactive rules under the FMA without express statutory authorization. Having rejected a similar argument in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 215 (1988), this Court should reject it again here.

* * *

Without any congressional consideration of the international, federal, and local interests at stake, the Secretary took the extraordinary step of proclaiming state and local property taxes preempted, both prospectively and retroactively. This Court should grant review to consider the legality of that highly intrusive agency action, and to clarify that federal agencies have only as much preemptive power as Congress clearly confers. By holding that even when foreign affairs are involved, ambiguous statutes cannot authorize agency preemption, this Court would shield vital state powers from federal agency overreach.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

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THE CITY OF NEW YORK,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITED AUTHORITIES	ii
REPLY ARGUMENT	1
Introduction	1
A. The Court of Appeals Erred by Discarding the Presumption against Preemption and Deferring to the Secretary's Mistaken View of her Own Preemptive Powers	3
B. Respondents Cannot Now Claim that a Newly-Cited Federal Statute Authorized the Secretary's Assertion of Preemptive Power	6
C. The FMA Does not Grant the Secretary Authority to Promulgate Retroactive Rules	8
CONCLUSION	10

TABLE OF CITED AUTHORITIES

Page

CASES

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 7, 8, 9

Fernandez-Vargas v. Gonzales,
548 U.S. 30 (2006) 9

Hamdan v. Rumsfeld,
548 U.S. 557 (2006) 9

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 9

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 7

New York v. FERC,
535 U.S. 1 (2002) 3

Oklahoma Tax Comm'n v. Chickasaw Nation,
515 U.S. 450 (1995) 7

Palestine Info. Office v. Shultz,
853 F.2d 932 (D.C. Cir. 1988) 4

Pennsylvania Dep't of Corr. v. Yeskey,
524 U.S. 206 (1998) 6-7

Cited Authorities

	Page
Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193 (2007)	1
PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001)	6
Republic of Austria v. Altmann, 541 U.S. 677 (2004)	9
Republic of Iraq v. Beaty, __ U.S. __, 129 S. Ct. 2183 (2009)	9
Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng., 531 U.S. 159 (2001)	3
Sprietsma v. Mercury Marine, 537 U.S. 51 (2002)	7
Wyeth v. Levine, __ U.S. __, 129 S. Ct. 1187 (2009)	3, 4, 5
Yee v. Escondido, 503 U.S. 519 (1992)	6
STATUTES	
22 U.S.C. §§ 254a *et seq.*	7, 8
22 U.S.C. §§ 4301 *et seq.*	*passim*

Cited Authorities

	Page
22 U.S.C. § 4302	5
22 U.S.C. § 4304	5
22 U.S.C. § 4307	4
TREATIES	
Vienna Convention on Consular Relations, 21 U.S.T. 77 (1969)	8
Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227 (1972)	7-8

REPLY ARGUMENT

INTRODUCTION

Respondents ignore Petitioner's central point: this Court should grant *certiorari* to resolve the tension between two lines of precedent and clarify that federal agencies have as much preemptive power as Congress clearly and manifestly intended to grant, not as much preemptive power as agencies would have liked Congress to grant.

Striving to portray this case as raising merely a question of statutory interpretation, unworthy of this Court's consideration, Respondents claim that the Court of Appeals faithfully applied this Court's preemption principles. In fact, the Court of Appeals erred by discarding the presumption against preemption, and instead deferring to the Secretary's interpretation of her own preemptive powers (see Pet. at 17-38).

Beyond misapplying preemption principles, the Court of Appeals sanctioned a novel and troubling exercise of federal agency power. By administrative fiat – a Notice published in the Federal Register without notice or an opportunity for comment – the Secretary purported to create preemptive new State and local property tax exemptions for mission and consular staff housing. The Secretary's Notice defies:

> - this Court, which in *Permanent Mission*, 551 U.S. 193 (2007), rejected Respondents' jurisdictional immunity arguments and remanded this case for the District Court to

determine the validity of Petitioner's tax liens on Respondents' staff housing;

- the District Court, which held on remand that Respondents' staff housing is subject to local property taxes, and entered a $47 million judgment validating Petitioner's tax liens (App. 71a-104a);

- Congress, which has directed the Secretary to withhold foreign aid payments from countries who fail to satisfy property tax judgments – judgments which cannot be entered if the Notice is valid (see Pet. at 7-8);

- Congress, which in the FMA authorized the Secretary to regulate mission and consular access to designated benefits without "otherwise affect[ing] State or local law" by, for example, creating preemptive new property tax exemptions (see Pet. at 26-38);

- the State Department's assurance to Congress, in 1982, that the FMA authorized only the "negative" preemptive power to deny missions and consulates designated benefits otherwise available under local law (see Pet. at 36); and

- the traditional and economically essential power of State and local governments to tax (see Pet. at 7-8; Brief for the International Municipal Lawyers Association, *et al.* as *Amicus Curiae* at 6-7, 12-19, *City of New York v. Permanent Mission* (No. 10-627)).

By granting *certiorari*, this Court will have an opportunity to check the Secretary's extraordinary attempt to expand her power at the expense of judicial, Congressional and local powers.

A. The Court of Appeals Erred by Discarding the Presumption against Preemption and Deferring to the Secretary's Mistaken View of her Own Preemptive Powers.

As Petitioner has shown, the Court of Appeals erred by jettisoning the clear statement rule, as suggested by *New York v. FERC*, 535 U.S. 1 (2002), instead of applying the rule, as required by *Wyeth v. Levine*, ___ U.S. ___, 129 S. Ct. 1187 (2009) (Pet. at 17-22). Having abandoned the clear statement rule, the Court of Appeals further erred by deferring to the Secretary's unjustifiably broad interpretation of her own preemptive powers, contrary to *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (Pet. at 22-38). Respondents claim, however, that the Court of Appeals "acknowledged the presumption against preemption," without deferring to the Secretary (Opp. Br. at 1, 9, 11-12, 16).

The Court of Appeals indeed acknowledged that the presumption applies "when there is doubt about whether Congress intended to provide an agency" preemptive authority, as well as "where the text of a preemption clause is ambiguous" (App. 35a). At the very least, the FMA and its preemption provision create substantial doubt as to whether Congress intended to grant the Secretary authority to preempt State and local tax laws (see Pet. at 26-38). Yet the Court of Appeals, citing *FERC*, 535 U.S. 1, erroneously refused to apply the presumption (App. 35a),

and proceeded to interpret every statutory ambiguity in *favor* of the Secretary's assertion of broad preemptive powers (see Pet. at 34).

In doing so, the Court of Appeals admitted to affording the Secretary's interpretation of the FMA "especially substantial" deference (App. 19a). Indeed, the Court of Appeals consistently tracked flawed arguments advanced in the United States' *amicus* briefs (see Pet. at 29-31, 33).

At the invitation of the United States, for example, the Court of Appeals (like Respondents) construed the Secretary's preemptive powers broadly, because the FMA delegates "broad" authority to the Secretary (U.S. Amicus Br. at 3, 5, 11, 14, 20; U.S. Supp. Amicus Br. at 2-6; App. 15a, 20a, 22a, 25a, 29a-30a, 36a-37a; Opp. Br. at 3, 5, 6, 8, 11). Congress certainly granted the Secretary authority to "supervis[e]" and regulate foreign missions and consulates. *See, e.g., Palestine Info. Office v. Shultz*, 853 F.2d 932, 937 (D.C. Cir. 1988). The FMA does not, however, clearly and manifestly express Congressional intent to authorize preemption of historical State and local tax powers (see Pet. at 12, 26-38). To the contrary, Congress sought to protect those powers (see Pet. at 32-34).

The Court of Appeals erred by accepting the United States' precedent-defying interpretation of the FMA preemption provision, § 4307, as implicitly authorizing an extraordinary agency power to preempt State and local property tax laws (see Pet. at 31-34). Ignoring nearly all of Petitioner's cited cases, Respondents strain to characterize the Court of Appeals' interpretation as "consistent" with *Wyeth*, 129 S. Ct. 1187 (Opp. Br. at 15).

Nothing in *Wyeth* alters this Court's instructions for interpreting preemption provisions: accept reasonably narrow constructions, and do not infer clear and manifest preemptive intent from Congressional silence (see Pet. at 31-34).

The Court of Appeals also adopted the United States' incorrect interpretation of FMA §§ 4302(a)(1) and 4304(b) as allowing the Secretary to create local law tax exemptions as a "benefit" for foreign missions (see Pet. at 26-31). As Petitioner has shown, these FMA provisions authorize the Secretary to "designate" otherwise available real property, goods, and services as "benefits," and to regulate foreign missions' access to designated "benefits," not to create new local law tax exemptions for foreign missions and consulates (Pet. at 26-29, 39).

Respondents assert that because the premises of *bilateral* diplomatic missions enjoy certain tax exemptions under international law, the Secretary merely "designated" existing exemptions as "applicable" to consular and *multilateral* mission staff housing (Opp. Br. at 2, 17-19). This argument contradicts the Secretary's Notice, which describes the new tax exemption as "in accord with," rather than an application of, other exemptions. Moreover, as the State Department had consistently ruled before the Secretary issued the Notice (including in a Diplomatic Note concerning the staff housing at issue here), tax exemptions for staff housing were not, and are not, available under international, federal, State or local law (see Pet. at 36; App. 81a-85a & n.2). Thus, the Secretary could not confer such exemptions without first creating them.

Contrary to Respondents' assertion (Opp. Br. at 2, 19), Petitioner has properly advanced its contention that the Secretary exceeded her FMA powers by purporting to create tax exemptions (Pet. at 26-29). "[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992). In the Court of Appeals, Petitioner contended that the Secretary's power to designate FMA benefits does not include the power to create and confer local law tax exemptions (see Brief for Plaintiff-Appellee in Response to Amicus at 4, 19-20, 27, 32). Having placed at issue the scope of the Secretary's designation power, Petitioner may now emphasize the distinction between designating and creating benefits. *See, e.g., PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 & n.27 (2001) (having raised Americans with Disability Act coverage claim below, petitioner permissibly advanced new coverage argument in petition for *certiorari* and merits brief).

Again, this Court should grant *certiorari* to clarify that when Congress does not clearly authorize a federal agency to preempt State and local laws, courts should apply the clear statement rule, rather than deferring to the agency's view of its own preemptive powers.

B. Respondents Cannot Now Claim that a Newly-Cited Federal Statute Authorized the Secretary's Assertion of Preemptive Power.

While a party may advance a new argument in support of a claim asserted below, a party cannot assert a wholly new claim for the first time. *See, e.g., Pennsylvania Dep't*

of Corr. v. Yeskey, 524 U.S. 206, 212-13 (1998) (generally, this Court only decides questions raised, involved in, or passed upon by lower courts). This Court should therefore disregard Respondents' improperly-asserted new claim that the Diplomatic Relations Act ("DRA"), 22 U.S.C. §§ 254a *et seq.*, somehow authorizes the Secretary's Notice (Opp. Br. at 20). *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (by failing to raise it below, respondent waived argument that federal maritime law governs case); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 456-57 (1995) (refusing to consider Oklahoma's argument, asserted for first time in merits brief, that newly-referenced federal statute authorized challenged state tax).

Moreover, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). The Secretary, in her Notice, and the United States, in its *amicus* briefs submitted to the Court of Appeals, relied on the FMA, not the DRA, as the Secretary's exclusive statutory authority for creating preemptive new tax exemptions.

In any event, Respondents' new DRA argument lacks merit. Under the DRA, the President (or the Secretary as his designee) "may, on the basis of reciprocity . . . , specify privileges and immunities" for diplomatic missions "which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention"

on Diplomatic Relations, 23 U.S.T. 3227 (1972) (the "VCDR"). 22 U.S.C. §§ 254a(3-4), 254c. Whereas the phrase "privileges and immunities" refers to international law obligations (see U.S. Amicus Br. at 4 n.4), international law does not exempt staff housing from State and local property taxes (App. 81a-85a & n.2). Moreover, because the concept of reciprocity is inapplicable to multilateral (*e.g.*, U.N.) missions (see IA126-27), the Secretary cannot act "on the basis of reciprocity" to create a new tax exemption for U.N. mission staff housing. Nor does § 254c apply to foreign consulates, whose privileges and immunities are governed by the Vienna Convention on Consular Relations, 21 U.S.T. 77 (1969), not the VCDR.

C. The FMA Does not Grant the Secretary Authority to Promulgate Retroactive Rules.

Like the Court of Appeals (App. 43a-44a), Respondents concede that the Secretary's Notice purports to operate retroactively (Opp. Br. at 21). Under this Court's precedent, that concession triggers the presumption against retroactivity, which requires clear and express Congressional authority – absent from the FMA – for the Secretary to promulgate retroactive rules (Pet. at 38-40).

Under *Bowen*, 488 U.S. 208, determining the validity of an arguably retroactive agency rule involves two questions: (1) does the rule operate retroactively; and, if so, (2) does the statute clearly and expressly authorize retroactive rule-making. Contrary to Respondents' (and the Court of Appeals') conflated analysis (Opp. Br. at 21-24; App. 43a-45a, 49a-63a), only the first question involves considerations such as whether the rule impairs vested rights, or upsets settled expectations. Because the Notice

purports to operate retroactively, such considerations lack relevance here.

Misconstruing this Court's precedent, Respondents argue that under *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), agencies may promulgate retroactive rules without clear Congressional authorization (Opp. Br. at 22-24 & n.9). In *Altmann*, which did not involve agency rule-making, this Court declined to apply the presumption against retroactivity, and instead scrutinized the FSIA for any sign of Congress' retroactive intent. 541 U.S. at 692-700. This Court limited its ruling, however, to the "*sui generis* context" of a statute that determined jurisdiction over foreign sovereigns. 541 U.S. at 696; *see also Republic of Iraq v. Beaty*, __ U.S. __, 129 S. Ct. 2183, 2194 (2009) (applying *Altmann* exception to law that merely altered rules of foreign sovereign immunity).

Subsequent cases confirmed the narrowness of *Altmann*'s exception to the presumption against retroactivity. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 576 (2006); *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 38 n.6 (2006). Thus, contrary to Respondents' unjustifiably expansive interpretation, *Altmann* overruled neither *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), nor *Bowen*, 488 U.S. 204.

Respondents cannot render *Altmann* applicable here by describing the Notice as a determination "regarding the immunity of foreign sovereigns" (Opp. Br. at 24 n.9). Whereas *Altmann* concerned jurisdictional immunity, the Notice purports to change the *substantive* law by creating a new immunity from State and local property taxes.

Accordingly, the Court of Appeals relied on irrelevant factors – such as whether the Notice impairs vested rights, or upsets settled expectations – to determine whether Congress, in the FMA, authorized the Secretary to promulgate retroactive rules. This Court should grant *certiorari* to clarify that under this Court's precedent, the Secretary lacked such authority.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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No. 10-627

In the Supreme Court of the United States

CITY OF NEW YORK, NEW YORK, PETITIONER

v

PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Foreign Missions Act, 22 U.S.C. 4301 *et seq.*, authorizes the State Department to designate an exemption from state and local real property taxes as a benefit for certain foreign mission property in the United States.

2. Whether the State Department's benefit determination validly extended to previously assessed taxes and tax liens, as well as to future efforts to impose real estate taxes.

TABLE OF CONTENTS

Page

Statement 1
Discussion 8
I. The court of appeals' holding that the State Department acted within its statutory authority in providing a tax exemption as a "benefit" does not warrant review 9
A. The court of appeals' decision is correct 9
B. The court of appeals' preemption analysis does not conflict with any other court's decision 17
II. The court of appeals' holding regarding existing assessments and liens is correct and does not merit review 21
Conclusion 23

TABLE OF AUTHORITIES

Cases:

American Ins. Ass'n v. *Garamendi*, 539 U.S. 396 (2003) 13
Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 13
City of N.Y. v. *FCC*, 486 U.S. 57 (1988) 6, 12, 18
Crosby v. *National Foreign Trade Council*, 530 U.S. 363 (2000) 13, 20
Dames & Moore v. *Regan*, 453 U.S. 654 (1981) 22
Desiano v. *Warner-Lambert & Co.*, 467 F.3d 85 (2d Cir. 2006), aff'd by an equally divided court, 552 U.S. 440 (2008) 19
Fidelity Fed. Sav. & Loan Ass'n v. *de la Cuesta*, 458 U.S. 141 (1982) 12, 13, 14, 18
Free v. *Bland*, 369 U.S. 663 (1962) 14

Cases—Continued: Page

Louisiana Pub. Serv. Comm'n v. *FCC*, 476 U.S. 355 (1986) 12
New York v. *FERC*, 535 U.S. 1 (2002) 18
Palestine Info. Office v. *Shultz*, 551 U.S. 193 (2007) 20
Republic of Aus. v. *Altmann*, 541 U.S. 677 (2004) 7, 21, 22
Republic of Iraq v. *Beaty*, 129 S. Ct. 2183 (2009) 22
Sheridan Kalorama Historical Ass'n v. *Christopher*, 49 F.3d 750 (D.C. Cir. 1995) 9
Solid Waste Agency v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) 19
United States v. *County of Arlington*, 669 F.2d 925 (4th Cir. 1982), appeal dismissed & cert. denied by an equally divided court, 459 U.S. 801 (1982) 14, 15
United States v. *Turkette*, 452 U.S. 576 (1981) 11
Wabash Valley Power Ass'n v. *Rural Electrification Admin.*, 988 F.2d 1480 (7th Cir. 1993) 19
Wisniewski v. *United States*, 353 U.S. 901 (1957) 19

Treaties and statutes:

Vienna Convention on Consular Relations, *done* Apr. 24, 1963, Art. 32(1), 21 U.S.T. 77, 78, 596 U.N.T.S. 261, 288 14
Vienna Convention on Diplomatic Relations, *done* Apr. 24, 1964, Art. 23(1), 23 U.S.T. 3227, 3238, 500 U.N.T.S. 95, 108 14
Administrative Procedure Act, 5 U.S.C. 553 *et seq.* 8
Foreign Missions Act, 22 U.S.C. 4301 *et seq* 1
22 U.S.C. 4301(b) 1, 11

Statutes—Continued: Page

22 U S C 4301(c) ..... *passim*
22 U.S.C. 4302 23
22 U.S.C. 4302(a)(1) 2, 5, 9, 11
22 U S.C. 4302(a)(1)(A)-(G) 11
22 U.S.C. 4302(b) 2, 5, 9, 11, 13
22 U.S.C. 4303(2) 2, 4, 10
22 U.S C. 4304 ..... 2, 6, 23
22 U.S.C. 4304(a) 10
22 U.S.C. 4304(a)-(b) 2, 4, 10
22 U.S.C. 4304(b)(1)-(4) 2, 15
22 U.S.C. 4304(b)(4) 22
22 U.S C. 4307 ..... 7, 14, 15
22 U.S.C 4308(g) 3, 13
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq*.
28 U.S.C. 1604 3
28 U.S.C. 1605(a)(4) 3
28 U.S.C. 1441(d) 3

Miscellaneous:

127 Cong Rec 26,074 (1981) 13
Department of State, *Designation and Determination under the Foreign Missions Act*, 74 Fed. Reg. 31,788 (2009) 4, 5, 7, 15, 16, 17
51 Fed. Reg. 27,303 (1986) 15
H.R. Rep. No. 102, 97th Cong., 1st Sess. Pt. 1 (1981) 12
S. Rep. No. 283, 97th Cong , 1st Sess (1981) 12

Miscellaneous—Continued: Page

United States Mission to the U N. Circular Note HC-12-01 (Apr. 5, 2001) 15

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Foreign Missions Act (FMA), 22 U.S.C. 4301 *et seq.*, governs the treatment of foreign missions in the United States. In enacting the FMA, Congress stated that it is "the policy of the United States to support the secure and efficient operation of United States missions abroad, to facilitate the secure and efficient operation in the United States of foreign missions, * * * and to assist in obtaining appropriate benefits, privileges, and immunities for those missions." 22 U.S.C. 4301(b). To that end, the FMA confers on the State Department

authority to determine "[t]he treatment to be accorded to a foreign mission in the United States * * * after due consideration of the benefits, privileges, and immunities provided to missions of the United States in the country or territory represented by that foreign mission, as well as matters relating to the protection of the interests of the United States." 22 U.S.C. 4301(c).

The State Department may "[p]rovide or assist in the provision of benefits for or on behalf of a foreign mission in accordance with section 4304 of this title." 22 U.S.C. 4303(2). Under Section 4304, the Department may do so upon request of a foreign mission, or upon "determin[ing] that such action is reasonably necessary on the basis of reciprocity or otherwise" in order to advance certain enumerated foreign relations goals. 22 U.S.C. 4304(a)-(b). Those goals include "facilitat[ing] relations between the United States and a sending State," "protect[ing] the interests of the United States," "adjust[ing] for costs and procedures of obtaining benefits for missions of the United States abroad," and "resolving a dispute affecting United States interests and involving a foreign mission or sending State." 22 U.S.C. 4304(b)(1)-(4).

The FMA defines the term "benefit" expansively, as "including the acquisition of" a list of property, goods, or services, such as "real property," "public services," "locally engaged staff," and "protective services." 22 U.S.C. 4302(a)(1). The term "benefit" also "includes such other benefits as the Secretary may designate." *Ibid.* "Determinations with respect to the meaning and applicability of the terms used" in the FMA, including "benefit," are "committed to the discretion of the Secretary." 22 U.S.C. 4302(b). The FMA also provides that "[e]xcept as otherwise provided, any determination re-

quired under [the FMA] shall be committed to the discretion of the Secretary." 22 U.S.C. 4308(g).

2. Petitioner City of New York brought suit in state court against respondents, the Permanent Mission of India to the United Nations and the Principal Resident Representative of Mongolia to the United Nations, based on their failure to pay local property taxes on certain properties owned by the governments of India and Mongolia. The properties contain the offices of the Indian and Mongolian missions to the United Nations (UN), and include residences for their UN mission staff and, in India's case, consular staff. Petitioner seeks unpaid property taxes levied on the portions of the properties used as staff residences, as well as a declaratory judgment establishing the validity of tax liens on the properties due to respondents' failure to pay the taxes. Pet. 9-10.

After these suits were removed to the District Court for the Southern District of New York, see 28 U.S.C. 1441(d), respondents moved to dismiss on the ground that they were immune from suit under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1604. The district court denied the motion, and the Second Circuit affirmed. See 446 F.3d 365. This Court also affirmed, holding that petitioner's claims fell within an exception to foreign sovereign immunity for cases involving "rights in immovable property situated in the United States," 28 U.S.C. 1605(a)(4). See 551 U.S. 193.

3. On remand, the district court held that petitioner's tax liens were valid, rejecting respondents' arguments that international law prohibits assessment of taxes against property used to house diplomatic and consular staff of a foreign government. Pet. App. 77a-104a. Respondents appealed.

4. On June 23, 2009, while respondents' appeal was pending, the State Department issued a Notice titled *Designation and Determination under the Foreign Missions Act*, 74 Fed. Reg. 31,788 (Notice). The Notice explained that the State Department had determined that property owned by foreign governments and used to house staff of consular posts or missions to the United Nations or the Organization of American States was exempt from state and local real property taxes. *Ibid.* The Department accordingly designated the tax exemption a "benefit" pursuant to the FMA. *Ibid.*; see 22 U.S.C. 4303(2), 4304(a)-(b). The Notice specified that the tax exemption "shall be provided to such foreign missions on such terms and conditions as may be approved by the Office of Foreign Missions" of the State Department, and that "any state or local laws to the contrary are hereby preempted." 74 Fed. Reg. at 31,788. The Notice provided that the Department's determination "shall operate to nullify any existing tax liens with respect to such property." *Ibid* The Department did not require any refunds of taxes previously paid by a foreign government. *Ibid.*

The State Department determined that the Notice was "necessary to facilitate relations between the United States and foreign states, to protect the interests of the United States, to allow for a more cost effective approach to obtaining benefits for U.S. missions abroad, and to assist in resolving a dispute affecting U.S. interests and involving foreign governments which assert that international law requires the exemption from taxation of such diplomatic and consular properties." 74 Fed. Reg. at 31,788. The tax exemption was intended to resolve a longstanding dispute between the United States and foreign governments (including respondents)

by "conform[ing]" United States practice "to the general practice abroad of exempting government-owned property used for bilateral or multilateral diplomatic and consular mission housing." *Ibid.* The Department explained that local efforts to tax such property "ha[d] become a major irritant in the United States' bilateral relations." *Ibid.* As a result, the United States was "threaten[ed]" with "hundreds of millions of dollars in reciprocal taxation," and foreign governments had raised obstacles to implementation of security improvements to United States diplomatic and consular facilities abroad, "imposing unacceptable risks to the personnel working in those facilities." *Ibid.*

5. The court of appeals reversed and remanded with instructions to dismiss. Pet. App. 1a-70a. The court held that the Notice was a valid exercise of the State Department's authority under the FMA.

a. The court first held that the "FMA authorizes the State Department to designate property tax exemptions for mission and consular staff residences as 'benefits.'" Pet. App. 20a. Section 4302(a)(1), the court explained, defines "benefit" by listing "a variety of thereafter enumerated goods and services," and then stating, "in a phrase set-off from [the] aforementioned list of examples," that "benefit" also "includes such other benefits as the Secretary may designate." *Id.* at 21a-22a (quoting 22 U.S.C. 4302(a)(1))). The court concluded that this "broad and open-ended language," together with Section 4302(b)'s grant of discretion to the State Department to determine the meaning of the FMA's terms, confers on the Department expansive authority to "designate additional benefits" beyond the enumerated categories. *Id.* at 22a. The FMA thus guides the Department's exercise of its discretion not by limiting the scope of permissible

"benefits," but by directing, in Sections 4301(c) and 4304, that the Department consider the reciprocal treatment of United States missions, the interests of the United States, and other foreign-relations goals. *Id.* at 22a-23a.

The court therefore rejected petitioner's argument that the FMA permits the State Department only to restrict the benefits otherwise available to a foreign mission, "as a way to reciprocate for restrictions imposed on United States missions abroad." Pet. App. 21a. The canon of *ejusdem generis* also did not apply, the court held, because the enumerated categories of benefits were "structurally separate" from the conferral of authority to designate other benefits. *Id.* at 23a-26a. Petitioner's interpretation, moreover, was inconsistent with Congress' evident desire to give the State Department flexibility to conduct relations with foreign governments and further United States interests, including the interest in ensuring favorable reciprocal treatment of United States missions abroad. *Id.* at 27a-31a.

The court next rejected petitioner's argument that the FMA does not permit the State Department to provide a benefit that has the effect of preempting contrary state or local tax laws. Pet. App. 31a-42a. The court explained that "[a] federal agency 'may preempt state regulation' * * * provided the agency is 'acting within the scope of its congressionally delegated authority.'" *Id.* at 31a-32a (quoting *City of N.Y.* v. *FCC*, 486 U.S. 57, 63-64 (1988)). Relying on the FMA's "exceptionally broad" grant of authority to the State Department, the need for federal uniformity in the foreign-affairs context, and Congress' intent that the Department determine the national treatment of foreign missions in furtherance of United States interests, the court concluded that the

"language, structure, and subject-matter of the FMA all strongly indicate that Congress meant" to confer preemptive authority. *Id.* at 36a; see *id.* at 31a-42a.

The court rejected petitioner's argument that the Department's authority in this case was limited by Section 4307, which provides that nothing in the FMA "may be construed to preempt any State or municipal law * * * regarding zoning, land use, health, safety, or welfare, except that a denial by the Secretary involving a benefit * * * shall be controlling." 22 U.S.C. 4307. That provision, the court stated, is a savings clause that partially shields certain laws from preemption, and the omission of tax laws from its scope demonstrates that such laws may be preempted by granting positive benefits. Pet. App. 33a.

b. The court also upheld the Notice's effect of "nullify[ing] any existing tax liens" on property used to house mission staff. 74 Fed. Reg. at 31,788. The court acknowledged the presumption that a grant of rulemaking authority "will not, as a general matter, be understood to encompass the power to promulgate retroactive rules" in the absence of a clear statement. Pet. App. 45a (citation omitted). The court concluded, however, that *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), in which the Court declined to apply the presumption in determining the FSIA's retroactive effect, "demonstrates that the force of the presumption depends on the values that underlie it and the degree to which such values are at issue." Pet. App. 49a. Here, the court explained, those values were not strongly implicated because the tax exemption burdened only the public rights of States and municipalities and did not upset settled expectations, in view of the long-running uncertainty about the status of petitioner's claimed right to tax. *Id.*

at 53a. The court therefore concluded that the presumption against retroactivity was not dispositive. *Id.* at 61a.

The court then held that the FMA allowed the State Department to take action that would nullify existing tax liens. Pet. App. 62a. In light of "the FMA's substantial delegation of discretionary authority to the State Department," and the statute's express expectation that the State Department would resolve disputes with foreign nations concerning their missions, "it would be anomalous to read the FMA as requiring the State Department to resolve disputes involving foreign missions through the designation of benefits, and yet to tie the Department's hands by limiting it to prospective solutions that may not address the sources of the conflicts."[1] *Id.* at 62a-63a.

DISCUSSION

Petitioner challenges the court of appeals' conclusion that the State Department acted within its authority in defining as a benefit under the FMA a tax exemption for certain foreign government-owned property and in applying that exemption to existing tax liens. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. The court applied settled principles and relied on circumstances unique to this case, including the FMA's express grant of expansive discretion to the State Department, the particular importance of federal uniformity and regulatory flexibility in the foreign-relations context, and reciprocity. The court's narrow decision is

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[1] The court also rejected petitioner's argument that the Notice was procedurally defective under the Administrative Procedure Act, 5 U.S.C. 553 *et seq.* Pet. App. 63a-68a. Petitioner has not challenged that holding before this Court. See Pet i.

thus unlikely to have implications beyond the context of this case. Further review is not warranted.

I. THE COURT OF APPEALS' HOLDING THAT THE STATE DEPARTMENT ACTED WITHIN ITS STATUTORY AUTHORITY IN PROVIDING A TAX EXEMPTION AS A "BENEFIT" DOES NOT WARRANT REVIEW

A. The Court Of Appeals' Decision Is Correct

Petitioner challenges (Pet. 26-38) the court of appeals' conclusion that the State Department possessed authority under the FMA to designate as a "benefit" a tax exemption for foreign government property used to house consular and mission staff. Petitioner's argument is without merit, and the court of appeals' interpretation of the FMA does not conflict with that of any other court.

1. The court of appeals correctly determined that the tax exemption granted by the Notice falls within the State Department's expansive authority to designate the "benefits" to be provided to foreign missions. Pet. App. 20a-31a. By stating that the term "benefit" "includes such other benefits as the Secretary may designate," 22 U.S.C. 4302(a)(1), the FMA confers on the State Department wide latitude to designate and provide benefits that are not specifically enumerated in the statute, in furtherance of the Department's authority to determine the treatment of foreign missions, 22 U.S.C. 4301(c). The breadth of that authority is confirmed by Section 4302(b), which provides that "[d]eterminations with respect to the meaning and applicability of the terms used" in the FMA, including "benefit," "shall be committed to the discretion of the Secretary." 22 U.S.C. 4302(b); cf. *Sheridan Kalorama Historical Ass'n* v. *Christopher*, 49 F.3d 750, 757-758 (D.C. Cir. 1995) (FMA

grants the State Department extremely wide discretion in fulfilling statutory purposes.).

The FMA guides the State Department's exercise of discretion in designating and providing benefits by specifying that the Secretary may provide benefits if requested by a foreign mission, or if the Secretary "determines that such action is reasonably necessary on the basis of reciprocity or otherwise" in order to advance certain foreign relations goals, including resolving disputes affecting United States interests. 22 U.S.C. 4304(a)-(b). In all cases, moreover, the Secretary's authority is to be exercised after "due consideration of the benefits * * * provided to missions of the United States" in other countries, "as well as matters relating to the protection of the interests of the United States." 22 U.S.C. 4301(c).

a. As the court of appeals correctly held, the "broad and open-ended language" in the definition of "benefits" permits the State Department to determine that a property tax exemption is an appropriate "benefit" to provide to foreign missions. Pet. App. 22a. Petitioner contends (Pet. 26-31) that the FMA confers only the authority to identify pre-existing benefits in order to restrict a foreign mission's access to them, but such a limited view of the Secretary's authority is contrary to the FMA's text. The fact that the FMA authorizes the Secretary to "[p]rovide or assist in the provision of benefits," 22 U.S.C. 4303(2), and to do so at the "request" of foreign missions, 22 U.S.C. 4304(a), indicates that the State Department's authority extends beyond simply withdrawing benefits in response to adverse treatment of United States missions abroad. See Pet. App. 26a. Moreover, had Congress intended to cabin the Department's authority in the manner petitioner suggests, it

would not have expressly granted the Department expansive authority to determine the "meaning and applicability" of the term "benefit," 22 U.S.C. 4302(b), and then identified broad considerations to guide the exercise of that discretion, see 22 U.S.C. 4301(c). It instead would have explicitly specified that the Department's discretion operates only in one direction—to *withdraw* existing benefits, rather than to grant positive benefits. See Pet. App. 22a-23a.

Petitioner relies on Section 4302(a)(1)'s provision that "benefit[s]" include "such other benefits as the Secretary may *designate*" to argue that the State Department's authority extends only to identifying and restricting pre-existing benefits. 22 U.S.C. 4302(a)(1) (emphasis added); see Pet. 27. But the fact that the Department may "designate," or identify, the dispensations that it has determined fall within the definition of "benefit" does not suggest that the Department is limited to identifying benefits that were already available. Nor does the canon of *ejusdem generis* support petitioner's argument; as the court of appeals correctly observed, Section 4302(a)(1)'s grant of authority to identify other benefits is "structurally separate from the enumeration" of benefits in Section 4302(a)(1)(A)-(G). Pet. App. 25a; see *United States* v. *Turkette*, 452 U.S. 576, 582 (1981).

Limiting the State Department's authority to restricting benefits as a sanction is also irreconcilable with the FMA's purpose of facilitating the "secure and efficient operation" of foreign missions in the United States. 22 U.S.C. 4301(b). The legislative history confirms that although Congress' primary focus was on reciprocal sanctions, Pet. App. 29a, Congress intended to permit the Executive Branch "both to * * * exercise more effective control over * * * foreign missions," such as

by imposing sanctions, "and to enhance the ability of foreign missions to conduct their representational duties in the United States," a purpose that contemplates granting affirmative benefits. S. Rep. No. 283, 97th Cong., 1st Sess. Pt. 1, at 8 (1981); see also H.R. Rep. No. 102, 97th Cong., 1st Sess. 28 (1981) (FMA "provide[s] the [State Department] flexibility * * * to decide which sanction or *other response* is most appropriate.") (emphasis added). Moreover, conferring affirmative benefits can be—as here—a means of furthering United States interests by ending or preventing adverse treatment of United States missions abroad. Petitioner suggests no reason that Congress would have arbitrarily prohibited the Department from utilizing a full range of methods in furtherance of United States foreign-relations and reciprocity interests. See Pet. App. 22a-23a.

b. The court of appeals also correctly held that the FMA confers on the State Department the authority to provide that its determinations preempt contrary state and local law. Pet. App. 31a-42a; see *City of N.Y.* v. *FCC*, 486 U.S. 57, 63-64 (1988) (*FCC*) ("a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation") (quoting *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 369 (1986)).

As the court explained, the FMA's grant of broad authority to determine the treatment of foreign missions in furtherance of the United States' foreign-relations interests evidences Congress' intent to authorize the State Department to confer benefits that have preemptive effect. Pet. App. 36a-37a; see *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 160-161 (1982) (*Fidelity*) (Congress' grant of broad authority demon-

strates intent to permit agency to preempt state law). In addition, by providing that "any determination required under" the FMA, including the definition and application of "benefits," is "committed to the discretion of the Secretary," 22 U.S.C. 4302(b), 4308(g), Congress intended that the State Department should have preeminent authority to determine the United States' treatment of foreign missions on a national level. Cf. 127 Cong. Rec. 26,074 (1981) (statement of Rep. Fascell) (section-by-section analysis of House bill substantially identical to enacted version; Section 4302(b) "is intended to avoid conflicting interpretations by different government agencies and courts and potential litigation that * * * might adversely affect the management of foreign affairs.").

Congress' intent to provide preemptive authority is particularly clear in view of the need for "uniformity in this country's dealings with foreign nations." *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413-414 (2003) (quoting *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964)). The State Department's authority under the FMA to set national policy regarding the treatment of foreign missions in order to protect the United States' foreign-relations interests necessarily includes the ability to preempt contrary state and local laws. See *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381 (2000) ("This clear mandate and invocation of exclusively national power belies any suggestion that Congress intended the President's effective voice to be obscured by state or local action."). Although petitioner asserts (Pet. 20, 35-38), that "traditional State taxing powers" are less susceptible to preemption, the "relative importance to the State of its own law" does not alter an agency's preemptive authority. *Fidelity*,

458 U.S. at 153 (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)). That is especially so here because in the foreign-relations context, taxation often raises particularly sensitive sovereignty concerns, and therefore local tax laws have significant potential to undermine the United States' ability to manage its relations with foreign sovereigns. See, *e g.*, *United States* v. *County of Arlington*, 669 F.2d 925, 932 (4th Cir.) (bilateral international agreements preempted local tax law with respect to residences housing bilateral diplomatic mission staff), appeal dismissed & cert. denied, 459 U.S. 801 (1982) (*Arlington County*). Indeed, the multilateral treaties governing bilateral diplomatic and consular relationships provide express exemptions from local taxation for offices of a diplomatic mission and consular post and for residences of the heads of such offices. See Vienna Convention on Diplomatic Relations, *done*, Apr. 24, 1964, Art. 23(1), 23 U.S.T. 3227, 3238, 500 U.N.T.S. 95, 108; Vienna Convention on Consular Relations, *done*, Apr. 24, 1963, Art. 32(1), 21 U.S.T. 77, 98, 596 U.N.T.S. 261, 288.

Petitioner's argument (Pet. 32) that Section 4307 establishes that the State Department may "only preempt local police powers * * * by denying benefits to foreign missions" is contrary to the statutory language. Section 4307 provides that with respect to state or local law "regarding zoning, land use, health, safety, or welfare," only a denial of benefits may have preemptive effect. 22 U.S.C. 4307. As the court of appeals explained, Section 4307 "cannot in its natural meaning be read as describing the FMA's full-preemptive scope, but rather [it is] a savings c[l]ause that insulates certain listed State and municipal powers from preemption." Pet. App. 38a; see *Fidelity*, 458 U.S. at 162-163. Because Section 4307 does not include state tax laws

among those subject to more limited preemption, it does not limit the Department's authority with respect to tax laws. Pet. App. 34a. Indeed, the omission of any reference to tax laws from this list affirmatively supports the propriety of the State Department's action.

2. In issuing the Notice, then, the State Department validly exercised its broad authority to designate a "benefit" to be provided to foreign missions and to preempt contrary state and local law. As provided in the FMA, the Department designated the tax exemption a benefit after considering reciprocity concerns, the United States' foreign-relations interests, the costs to United States missions abroad, and the need to "resolv[e] a dispute affecting United States interests and involving a foreign mission or sending State." 22 U.S.C. 4301(c), 4304(b)(1)-(4); see 74 Fed. Reg. at 31,788.

Significantly, the State Department's decision to issue the Notice took place against the backdrop of earlier notices regarding tax exemptions for staff residences of certain foreign missions. In 1986, for instance, the State Department issued a public notice recognizing, based on international law, an exemption from property taxes for the residences of the staff of bilateral foreign diplomatic missions. See 51 Fed. Reg. 27,303. The Fourth Circuit had upheld that exemption under the Supremacy Clause and prohibited efforts by a local government to tax the properties. See *Arlington County*, *supra* (upholding tax exemption based on international agreements).

At the time of that announcement, the State Department's position concerning tax exemption for staff-residence property extended only to housing for staff of bilateral diplomatic missions. See United States Mission to the U.N. Circular Note HC-12-01 (Apr. 5, 2001). In the intervening years, however, the taxation of foreign

government-owned property used to house staff of consulates and permanent missions to the United Nations—including taxation of the properties at issue in this case—has become a persistent irritant in the foreign relations of the United States. The governments of India and Mongolia, among others, have repeatedly objected to those tax assessments, and have sought protection from the State Department.

Even more significantly, as a result of the dispute, foreign governments have imposed or threatened to impose restrictions on the operation of United States missions abroad. For example, until recently, the government of India refused to issue construction permits for a new consular compound in Mumbai, resulting in substantial monetary costs to the United States and frustrating efforts to improve security for consular staff. See Gov't C.A. Br. 8; 74 Fed. Reg. at 31,788 (describing "[r]esponsive measures taken against the United States" that have hindered security improvements and "impos[ed] unacceptable risks to [American] personnel"). The State Department has informed this Office that foreign governments have also threatened to impose taxes on staff residences owned by the United States abroad, justifying their policies by reference to the taxable status of, and collection efforts regarding, their staff residences in New York.

The State Department concluded that state and local taxation of foreign mission properties in this country is disrupting the United States' foreign relations and threatening to cause disproportionate harm to the United States. And as the Notice explains, there is a "general practice abroad of exempting government-owned property used for bilateral or multilateral diplomatic and consular mission housing"—from which petitioner's

efforts to tax respondents' property depart. 74 Fed. Reg. at 31,788. Because the United States is "the largest foreign-government property owner overseas," it "benefits financially much more than other countries from an international practice exempting staff residences from real property taxes, and stands to lose the most if the practice is undermined." *Ibid.* Without the tax exemption, the State Department found, the United States could face the loss of hundreds of millions of dollars in reciprocal taxation. And as a result of the taxation, the government had encountered obstacles to the completion of necessary security improvements to diplomatic and consular facilities abroad. *Ibid.*

Having thus considered "the benefits, privileges, and immunities provided to missions of the United States" abroad, "as well as matters relating to the protection of the interests of the United States," 22 U.S.C. 4301(c), the Department invoked its authority under the FMA to extend the same tax treatment that applies to bilateral diplomatic missions to consular missions and missions to the United Nations and the Organization of American States. The Department's action falls within the core of its broad authority to provide "benefits" to foreign missions after consideration of United States interests and foreign-relations concerns.

B. The Court Of Appeals' Preemption Analysis Does Not Conflict With Any Other Court's Decision

Petitioner contends that this Court should grant review in order to clarify that the "presumption against preemption" requires Congress to "clearly and manifestly, if not explicitly," express its intent to grant an agency authority to preempt state law, and that an agency's view of its preemptive authority is entitled to "little, if

any, deference." Pet. 18, 23; see Pet. 17-26. Contrary to petitioner's argument, the court of appeals applied settled principles, and there is no conflict among decisions of this Court or the courts of appeals regarding the scope of an agency's authority to take action having preemptive effect. This case would also be a poor vehicle to resolve that issue.

1. As the court of appeals explained, Pet. App. 35a-36a, whether agency action may preempt state law turns on "whether that action is within the scope of the [agency's] delegated authority." *Fidelity*, 458 U.S. at 154 (1982); see *FCC*, 486 U.S. at 63-64. The answer to that question "does not involve a 'presumption against pre-emption,' * * * but rather requires us to be certain that Congress has conferred authority on the agency." *New York* v. *FERC*, 535 U.S. 1, 18 (2002) (the presumption assists courts in determining whether state law conflicts with federal law, not in determining the scope of the agency's preemptive authority). Thus, "[a] preemptive regulation's force does not depend on express congressional authorization to displace state law." *Fidelity*, 458 U.S. at 154.

In concluding that the FMA confers authority to provide benefits having preemptive effect, the court of appeals applied these well-established principles. The court correctly rejected petitioner's argument that the presumption against preemption was implicated, and framed the inquiry as "whether the State Department acted within the scope of its congressionally delegated authority." Pet. App. 35a, 36a-42a. Contrary to petitioner's argument (Pet. 34), moreover, the court had no occasion to—and did not—defer to the State Department's interpretation of its authority, or to consider how much deference was appropriate, because the court con-

cluded on the basis of the "language, structure, and subject-matter of the FMA" that the FMA confers authority on the State Department to take action having preemptive effect. See Pet. App. 36a-42a.

Petitioner acknowledges that the court of appeals applied the approach set forth in *FCC*, but contends (Pet. 18-19) that other decisions of this Court and the courts of appeals conflict with that approach. Petitioner relies primarily on *Solid Waste Agency* v. *United States Army Corps of Engineers*, 531 U.S. 159, 172-173 (2001), but that decision did not address preemption or the scope of an agency's authority to take action having preemptive effect; rather, it applied the canon of constitutional avoidance in rejecting an agency's statutory construction. *Wabash Valley Power Ass'n* v. *Rural Electrification Administration*, 988 F.2d 1480 (7th Cir. 1993), also does not conflict with the decision below. There, the court applied *FCC* in holding that a federal regulation preempting state law was invalid because it was not authorized by the relevant statute. See *id.* at 1486 (citing *FCC*); cf. *id.* at 1490 (referring to the presumption against preemption in suggesting that any conflict between state and federal law was not severe enough to warrant preemption). There is therefore no conflict warranting this Court's review.[2]

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[2] Petitioner also relies on *Desiano* v. *Warner-Lambert & Co.*, 467 F.3d 85, 97 n.9 (2d Cir. 2006), aff'd by an equally divided Court, 552 U.S. 440 (2008) (per curiam), but an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there the court of appeals simply noted that the presumption against preemption would be relevant to review of the agency's determination regarding a conflict between state and federal law. *Desiano*, 467 F.3d at 97 n.9.

2. This case would be a poor vehicle to consider petitioner's argument that a "clear[] and manifest[]" expression of congressional intent to confer preemptive authority is necessary, because petitioner would not benefit from a resolution of that question in its favor. In concluding that the FMA grants the State Department preemptive authority, Pet. App. 36a, the court found the clear manifestation of congressional intent that petitioner asserts is required. For the reasons stated above, that determination was correct. See pp. 12-17, *supra*. Moreover, although petitioner urges (Pet. 22-26) this Court to "clarify" that no deference is due an agency's interpretation of the scope of its preemptive authority, the court of appeals did not consider that question; its construction of the FMA did not rest on deference to the State Department's interpretation of its authority.

In addition, this case would be a poor vehicle to address any more general preemption question framed by petitioner because the FMA expressly confers unusually broad authority on the State Department to grant benefits to foreign missions in furtherance of the United States' foreign-relations interests. Because federal uniformity is particularly crucial in the foreign-relations context, Congress gave the State Department extremely wide latitude to define national policy concerning foreign missions. See pp. 13-14, *supra*. That broad conferral, moreover, is "in harmony with the President's own constitutional powers" to conduct foreign relations. *Crosby*, 530 U.S. at 380-381; see *Palestine Info. Office* v. *Shultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) (holding that, when acting under the FMA, "the State Department acts at the apex of its power" because "it wields the combined power of both the executive and legislative branches"). Any review of the State Department's authority to pre-

empt state law in this context would therefore be unlikely to have broader implications for preemption analysis beyond the unique circumstances of this case.

II. THE COURT OF APPEALS' HOLDING REGARDING EXISTING ASSESSMENTS AND LIENS IS CORRECT AND DOES NOT MERIT REVIEW

Petitioner briefly argues (Pet. 38-40) that this Court should review the court of appeals' conclusion that the FMA confers on the State Department the authority to issue benefit designations affecting existing assessments and liens. Petitioner does not allege any conflict among the courts of appeals, but simply seeks error correction of the court's narrow ruling. Further review is not warranted.

Contrary to petitioner's argument (Pet. 38), the court of appeals did not ignore the presumption against retroactivity or announce a categorical exception to the presumption. Pet. App. 61a. The court simply concluded, emphasizing that its "holding on this issue is narrow," that "the presumption against retroactivity is not determinative in this case" because several unique circumstances demonstrated that the concerns animating the presumption were not present. *Ibid.* The court relied on this Court's decision in *Republic of Austria* v. *Altmann*, 541 U.S. 677, 692-693, 696 (2004), which held that "the antiretroactivity presumption is just that—a presumption, rather than a constitutional command," and similarly declined to require a clear statement of retroactive effect because the concerns underlying the antiretroactivity presumption were not implicated under the circumstances.

The court of appeals' conclusion is correct. As the court explained, "the Notice does not upset expectations

that were genuinely settled" because the tax status of mission residences has long been uncertain, see Pet. App. 52a, 53a, 57a-60a; the Notice "implicates only public rights of States and municipalities," and thus does not threaten to burden an unpopular person or group, *id.* at 52a; and the impact on petitioner results from the federal government's authority to conduct foreign relations rather than any discriminatory intent, *ibid.* Petitioner does not dispute the existence of these unique circumstances or challenge the court's conclusion that the concerns underlying the presumption against retroactivity are not present here. Pet. 38-40.

After considering the text, structure, and purpose of the FMA, the court of appeals correctly concluded that the FMA permits benefit determinations by the State Department that affect existing assessments and liens in the circumstances presented here. The FMA contemplates that the State Department will use its benefit-designation authority to resolve disputes with foreign nations over the treatment of foreign missions. See 22 U.S.C. 4304(b)(4). In order to resolve such disputes, the Department must have the flexibility to determine the treatment of foreign missions in light of "current political realities and relationships" and the current interests of the United States. See *Altmann*, 541 U.S. at 696. As the court of appeals explained, "it would be anomalous to read the FMA as requiring the State Department to resolve disputes involving foreign missions * * * and yet tie the Department's hands by limiting it to prospective solutions that may not address the sources of the conflicts." Pet. App. 62a-63a; cf. *Dames & Moore* v. *Regan*, 453 U.S. 654, 679-684 (1981) (upholding President's suspension of pending claims against Iran); *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183, 2193-2194 (2009)

(upholding President's statutory authority to make an exception to foreign sovereign immunity inapplicable to Iraq, thereby affecting pending suits).

Petitioner's argument to the contrary (Pet. 39) rests on its contention that the FMA authorizes the State Department to resolve disputes only by restricting otherwise available benefits. For the reasons stated above, see pp. 9-12, *supra*, the court of appeals correctly rejected petitioner's interpretation of Sections 4302 and 4304. Further review of the court's narrow retroactivity holding is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2011

No. 10-627

In The Supreme Court of the United States

THE CITY OF NEW YORK,

Petitioner,

v.

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS
and
THE BAYARYN JARGALSAIKHAN,
as principal resident representative to the United Nations of the Mongolian People's Republic,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICI CURIAE* OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, and U.S. CONFERENCE OF MAYORS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Does the Foreign Missions Act (FMA), 22 U.S.C. § 4301 *et seq.*, pre-empt state and local taxation authority?

TABLE OF CONTENTS

Page

Question Presented for Review . . . . . (i)

Interest of *Amici Curiae* 1

Reasons for Granting the Petition 4

I. LOCAL PROPERTY TAXATION AUTHORITY FALLS WITHIN THE POLICE POWER FOR PURPOSES OF FMA SECTION 4307, AND IS NOT SUBJECT TO FEDERAL PRE-EMPTION 4

A. This Court Recognizes The Connection Between The Power To Tax And The Police Power . 5

B. *State And Local Authorities Need Stable Funding To Maintain Public Services, And Parties Relying On Those Services Must Assume A Fair Share Of The Tax Burden* 6

II. THE COURT OF APPEALS IGNORED THIS COURT'S PRESUMPTION AGAINST PRE-EMPTION OF STATE AND LOCAL TAXATION AUTHORITY AND GAVE IMPROPER DEFERENCE TO AN AGENCY INTERPRETATION 7

A. *The Secretary's Interpretive Authority Received Improper Deference Because There Is A*

Presumption Against Pre-emption And A Lack Of A Clear And Manifest Purpose Of Congress In Pre-Empting Local Taxation Authority 9

B. *Where State and Local Taxation Authority Is Implicated, The Presumption Against Pre-Emption Requires A Clear Statement By Congress Of Pre-Emptive Effect, And Such Is Absent In The FMA.* . 12

III. THE PETITION SHOULD BE GRANTED TO SETTLE SIGNIFICANT ISSUES OF STATUTORY CONSTRUCTION FOR TAX PRE-EMPTION 17

Conclusion 19

TABLE OF AUTHORITIES

Page

CASES

Barclays Bank Plc v. Franchise Tax Bd.,
512 U.S. 298 (1994) 8, 13, 14, 16
Bode v. Barrett, 344 U.S. 583 (1953) 5
Bonito Boats v. Thunder Craft Boats, Inc.,
489 U.S. 141 (1989) 10
Commonwealth Edison Co. v. Montana,
453 U.S. 609 (1981) 6
Container Corp. of Am. v. Franchise Tax Bd.,
463 U.S. 159 (1983) 13, 15
CSX Transp. Inc., v. Easterwood,
507 U.S. 658 (1993) 10
DeBuono v. NYSA-ILA Medical and Clinical Services Fund,
520 U.S. 806 (1997) 5
Dows v. Chicago, 78 U.S. (11 Wall.) 108 (1871) ... 17
Exxon Corp v. Wisconsin Dept. of Revenue,
447 U.S. 207 (1980) 6
Fair Assessment in Real Estate Ass'n, Inc. v. McNary,
454 U.S. 100 (1981) 17
First Bank Stock Corp. v. Minnesota,
301 U.S. 234 (1937) 13
Foster v. Love, 522 U.S. 67 (1997) 9
Gonzales v. Oregon, 546 U.S. 243 (2006) 4

Graham County Soil and Water Conservation Dist. v. U.S. ex rel Wilson, 130 S. Ct. 1396 (2010) 2
Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) 5
Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993) 14
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 14
Jones v. Rath Packing Co., 430 U.S. 519 (1977) ... 5
Kelo v. City of New London, 545 U.S. 469 (2005) .. 2
Maine v. Taylor, 477 U.S. 131 (1986) 13
McDonald v. Chicago, 130 S. Ct. 3020 (2010) 2
Medtronic Inc. v. Lohr, 518 U.S. 470 (1996) 8, 9, 10
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 13
Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994) 13
Pac. R.R. Co. v. Maguire, 87 U.S. 36 (1874) 12
Patterson v. State of Kentucky, 97 U.S. 501 (1878) . 4
Pleasant Grove v. Summum, 129 S. Ct. 1125 (2009) 2
Postal Telegraph-Cable Co. v. Richmond, 249 U.S. 252 (1919) 5
Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) 2
Wisconsin & M. R. Co. v. Powers, 191 U.S. 379 (1903) 12
Wyeth v. Levine, 129 S.Ct. 1187 (2009) 8, 9, 10

STATUTES

Foreign Missions Act (FMA),
22 U.S.C. § 4301 *et seq.* 12
22 U.S.C. § 4307 . . . . . *passim*

OTHER MATERIALS

Foreign Missions Act,
H.R. Rep. No. 97-102, Pt. 1 (1981) 15
Foreign Missions Act of 1982,
S. Rep. No. 97-329,
97th Cong., 2d Sess. (1982) 14, 18
N.Y.C. Office of Mgmt. & Budget,
Five Year Financial Plan Revenues and
Expenditures (2010) 6, 7
U.S. Department of State, Foreign Consular Offices
in the United States (Summer 2007) 18

INTEREST OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan professional organization consisting of more than 3500 members. The membership is comprised of local government entities, including cities and counties, and sub-divisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Among other things, IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

The National League of Cities (NLC) was founded in 1924 in order to foster collaboration between cities on urban affairs and proper methods of municipal governance. The NLC is a tireless advocate for over 19,000 cities and communities that are home to over 218 million Americans. Through a variety of projects, the organization aims to strengthen and promote cities

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[1] No counsel of a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and no person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2(a), parties were provided with timely notice of intent to file this brief and their written consent has been submitted to the Clerk.

as centers of opportunity, leadership, and governance.

The United States Conference of Mayors (USCM) is the official non-partisan organization of all United States cities with populations of 30,000 or more. Members are represented in the Conference by their chief elected official, the mayor. The Conference promotes the development of effective urban policy, strengthens federal-city relationships, and creates a forum in which mayors can share ideas and information. It also represents urban interests as an *amicus curiae* in several courts around the country.

Each organization has a record of filing *amicus* briefs in this Court when issues arise that are important to the cities, communities, and individuals they represent. Members of this Court have consistently recognized the strength and importance of those briefs by favorably citing them with frequency and on core issues involving federalism and state power. See *McDonald v. Chicago*, 130 S. Ct. 3020, 3137 (2010) (Breyer, J. dissenting) (citing the brief of USCM); *Graham County Soil and Water Conservation Dist. v. U.S. ex rel Wilson*, 130 S. Ct. 1396, 1406 (2010) (citing the brief of NLC); *Pleasant Grove v. Summum*, 129 S. Ct. 1125, 1133, 1135 n.3, 1136 (2009) (citing and quoting the brief of IMLA); *Kelo v. City of New London*, 545 U.S. 469, 489-90 n.24 (2005) (citing the brief of NLC); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 781 n.9 (2005) (Ginsburg, J. dissenting) (citing the brief of IMLA).

Amici respectfully submit the following brief in order to highlight the importance of this case to local governments. The current economic climate has placed

state and local governments in a position in which their services are increasingly vital, but also increasingly underfunded. Taxes like the one in question here have been an integral part of supporting essential community services.

Amici organizations are uniquely situated to address issues of state taxation, pre-emption, and federalism. Each represents community leaders from politically, economically, and geographically diverse cities and states around the country. The communities that these organizations represent all share an interest in properly enforcing state tax provisions and clearly outlining the contours of Congress's pre-emption power over state and local taxes.

The decision of the court of appeals stands to upset this Court's carefully crafted state tax pre-emption jurisprudence and to strike at the ability of local governments to levy much-needed property taxes. The International Municipal Lawyers Association, National League of Cities, and the United States Conference of Mayors submit this brief in order to call this Court's attention to an issue that is of the utmost importance to the fiscal strength and political independence of communities across the country.

REASONS FOR GRANTING THE PETITION

I. LOCAL PROPERTY TAXATION AUTHORITY FALLS WITHIN THE POLICE POWER FOR PURPOSES OF FMA SECTION 4307, AND IS NOT SUBJECT TO FEDERAL PRE-EMPTION

The petition for certiorari should be granted in order for this Court to reassert protection of state and local exercise of police power through taxation. Section 4307 of the Foreign Missions Act (FMA) bars any construction of the statute that pre-empts "any State or municipal law or governmental authority regarding zoning, land use, health, safety, or welfare." 22 U.S.C. § 4307 (1982). This provision articulates the traditional presumption against pre-emption of state and local police power as defined by this Court. See *Patterson v. State of Kentucky*, 97 U.S. 501 (1878); *Gonzales v. Oregon*, 546 U.S. 243 (2006).

But there is no need in this case for recourse to a canon of construction to determine whether Congress's intent was to enable the Secretary of State to pre-empt state and local taxation authority over certain classes of foreign mission housing. Because tax revenue supports the services through which states exercise police power, the power to tax is an aspect of police power. Thus the clear language of FMA section 4307 bars the Secretary's action here. This understanding of taxation follows established case law, Congress's intent, and the needs of public policy.

A. This Court Recognizes The Connection Between The Power To Tax And The Police Power.

This Court has repeatedly identified a connection between a state's power to tax and its exercise of police power. In *Bode v. Barrett*, 344 U.S. 583 (1953), this Court held that an Illinois tax on truck operators for use of public highways "is, indeed, a tax for the privilege of using the highways of Illinois . . . it is within the police power of Illinois to exact such a tax at least from intrastate operators." Id. at 585. According to the *Bode* Court, a tax connected to protecting public health, safety, or welfare is an exercise of the police power.

Other cases reaffirm the link between taxation and police power. In *DeBuono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806 (1997), this Court found a New York tax on medical facilities "clearly operates in a field that 'has been traditionally occupied by the states,'" namely, "the regulation of matters of health and safety." Id. at 814 (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977))). *DeBuono* articulates a general standard that taxes reasonably related to public health, safety, and welfare are an aspect of state police power.

This Court considers general revenue raising measures, including service fees, as an aspect of police power. A telegraph company licensing tax in *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252 (1919), was found to be "an exercise of the police power of the state for revenue purposes." Id. at 257. In

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), a state tax on out-of-state coal producers moving coal across state lines led this Court to discuss the obligation of out-of-state entities to shoulder a "just share of the tax burden." Id. at 624. "The 'just share of state tax burden' includes sharing in the cost of providing "police and fire protection, the benefit of a trained workforce, and the advantages of a civilized society." Id. (quoting *Exxon Corp v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980)).

B. *State And Local Authorities Need Stable Funding To Maintain Public Services, And Parties Relying On Those Services Must Assume A Fair Share Of The Tax Burden.*

The need for out-of-state entities to shoulder a just share of the tax burden continues to grow in the present economic climate. The City of New York anticipates a $3.3 billion deficit for the fiscal year starting July 1, 2011, which will expand to $4.8 billion by July 2013 absent new revenue. N.Y.C. Office of Mgmt. & Budget, Five Year Financial Plan Revenues and Expenditures (2010). New York serves as only one example of a national crisis. This year, 46 states face budget shortfalls totaling $125 billion, 39 of which already project continuing deficits into fiscal year 2012. Elizabeth McNichol et al., States Continue to Feel Recession's Impact, Center on Budget and Policy Priorities, at 1 (2010). State revenues have dropped at a rate never before recorded in the United States. Id. Without reliable revenue sources, state and local governments will be forced to curtail vital public

services. Reduced state and local taxes therefore block the effective exercise of police power.

Like many states and municipalities, the City of New York heavily relies on property tax income. New York derives one-quarter of its revenue from real property taxes. N.Y.C. Office of Management and Budget, *supra*. The Secretary of State's Notice nullifies property taxes assessed since 1980. The Second Circuit's holding magnifies the damage of this Notice by clearing a path for future nullification of currently and previously assessed taxes. The lower court's ruling diminishes New York City's tax base, hampering state and local governments' ability to budget resources for public health, safety, and welfare.

II. THE COURT OF APPEALS IGNORED THIS COURT'S PRESUMPTION AGAINST PRE-EMPTION OF STATE AND LOCAL TAXATION AUTHORITY AND GAVE IMPROPER DEFERENCE TO AN AGENCY INTERPRETATION

Assuming the power to tax is not intrinsically within the police power, and that FMA section 4307 is notionally silent as to whether state and local taxation authority is pre-empted, the Second Circuit should nevertheless have applied the longstanding presumption against pre-emption to find that Congress did not expressly intend to give the State Department the power to pre-empt local tax law. Moreover, the court of appeals accorded improper deference to an

agency's interpretation giving pre-emptive effect to the FMA. Two key principles of the law on pre-emption are in tension with the lower court's decision.

First, in all pre-emption cases, there is a presumption against pre-emption that accounts for the historic presence of state law without relying on the absence of federal regulation. *Wyeth v. Levine*, 129 S.Ct. 1187, 1195 n.3 (2009). In so doing, this Court awards the utmost respect for the states as "independent sovereigns in our federal system." *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996). In prior cases, this Court has given "some weight" to an agency's views about the impact of state law on federal objectives, but it has never "deferred to an agency's conclusion that state law is pre-empted." Id. at 1201.

Second, in the context of state taxation authority, even where foreign relations are implicated, the longstanding right permitting "the States [to] tax as they please" outweighs the risk of foreign retaliation. *Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 322 (1994). In the present case, the court of appeals awarded improper deference to an agency's interpretive authority and virtually ignored this Court's strong presumption against pre-emption. The Second Circuit deferred to the Secretary of State's conclusion, which is unprecedented as to the pre-emption of state taxation authority. Thus, the respect for states as independent sovereigns and their longstanding right of taxation authority was improperly disregarded in favor of an agency's informal interpretive action giving pre-emptive effect to the FMA.

A. *The Secretary's Interpretive Authority Received Improper Deference Because There Is A Presumption Against Pre-emption And A Lack Of A Clear And Manifest Purpose Of Congress In Pre-empting Local Taxation Authority.*

The Secretary of State's interpretive action, giving pre-emptive effect to the Foreign Missions Act (FMA), received improper deference. The court of appeals inadequately addressed the presumption against pre-emption and failed to accord proper weight to the statutory text at issue. To determine the scope of an agency's pre-emptive authority, the analysis begins with the relevant statutory text. *Lohr*, 518 U.S. at 484. The interpretation of the specific statutory language, however, "does not occur in a contextual vacuum." Id. at 485.

Rather, all pre-emption cases are guided by a presumption against pre-emption, which is supported by two cornerstones. *Wyeth*, 129 S.Ct. at 1194. First, because the "States are independent sovereigns in our federal system," this Court has "long presumed that Congress does not cavalierly pre-empt state-law." *Lohr*, 518 U.S. at 485. Second, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth*, 129 S.Ct. at 1194. Thus, the purpose of Congress must be sufficiently evident to rebut this Court's presumption against pre-emption.

Much of this Court's precedent suggests that pre-emptive authority must be based on a clear and manifest purpose contained within the statutory text. See *Foster v. Love*, 522 U.S. 67, 71 (1997) (finding that the pre-emption issue was "a narrow one turning

entirely on the meaning of the state and federal statutes"); *CSX Transp. Inc., v. Easterwood*, 507 U.S. 658, 664 (1993) (evidence of pre-emptive purpose is sought in the text and structure of the statute at issue); see also *Wyeth*, 129 S.Ct. at 1207 (Thomas, J., concurring) (noting the Supremacy Clause of the Constitution permits pre-emptive effect only when the specific federal standards and policies are set forth in the statutory text). Therefore, particularly in cases of potential pre-emption, the express language of the statute and its surrounding statutory framework is of principle concern. *Lohr*, 518 U.S. at 486.

Despite extensive reliance on the statutory text, this Court has, on occasion, looked beyond the text to highlight Congress's awareness of state law obstacles to federal policies in finding a lack of pre-emptive purpose. *Wyeth*, 129 S.Ct at 1200; see also *Bonito Boats v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989) ("the case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them."). In *Wyeth*, the Court emphasized that Congress was certainly aware of state law obstacles to specific Food and Drug Administration (FDA) objectives. *Wyeth*, 129 S.Ct at 1200. However, during the course of the FDA's entire 70-year history, Congress never enacted any express pre-emption provision to give pre-emptive effect to overcome such obstacles. Id. The Court reasoned that Congress's "silence on the issue coupled with its certain awareness of the prevalence of state tort

litigation," was powerful evidence of congressional purpose not to give pre-emptive effect to FDA objectives. Id.

In the present case, the court of appeals merely gave a dismissive glance to this Court's rule of a presumption against pre-emption and gave inadequate consideration to the statutory text. See *City of New York v. Permanent Mission of India*, 618 F.3d 172, 188 (2d Cir. 2010). Looking to the statutory text to find congressional purpose, as instructed in *Lohr*, FMA section 4307[2] provides no express authority to pre-empt state and local taxation authority. In fact, the statute only addresses state and municipal laws, such as zoning, land use, health, safety and welfare that are specifically not subject to pre-emption. This language does not assume, as a result, that all other areas of state law are now subject to the agency's interpretive authority to pre-empt based on Congress's silence alone. The statutory provision at issue here does not embody any such pre-emptive effect on state and local taxation authority.

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[2] 22 U.S.C. § 4307. "Notwithstanding any other law, no act of any Federal agency shall be effective to confer or deny any benefit with respect to any foreign mission contrary to this chapter. Nothing in section 4302, 4303, 4304, or 4305 of this title may be construed to preempt any State or municipal law or governmental authority regarding zoning, land use, health, safety, or welfare, except that a denial by the Secretary involving a benefit for a foreign mission within the jurisdiction of a particular State or local government shall be controlling." Id.

Moreover, even if looking beyond the text, Congress's silence on the issue, coupled with its sure and certain awareness that local governments historically intend to tax their residents, is evidence of congressional purpose not to give pre-emptive effect. Nearly thirty years have passed since Congress enacted section 4307, during which it amended the FMA numerous times and chose not to include an express pre-emption provision as to state and local taxation authority. See 22 U.S.C. § 4301. The Court's reasoning in *Wyeth* suggests that this is strong evidence of Congress's purpose weighing against pre-emption despite a potential state and local obstacle to the federal policy at issue. As such, the agency was given improper deference.

B. *Where State and Local Taxation Authority Is Implicated, The Presumption Against Pre-Emption Requires A Clear Statement By Congress Of Pre-Emptive Effect, And Such Is Absent In The FMA.*

Unless Congress explicitly gives the Secretary authority to pre-empt state and local tax law, state and local taxation authority is not subject to the Secretary's pre-emption. Two well-settled propositions support this conclusion. First, taxation is an inherent and sovereign right that "presumptively belongs to the State with respect to every species of property and to an unlimited extent." *Pac. R.R. Co. v. Maguire*, 87 U.S. 36, 42 (1874); see also *Wisconsin & M. R. Co. v. Powers*, 191 U.S. 379, 385 (1903) (finding that the right of taxation was essential to the existence and continuance of government); *First Bank Stock Corp. v. Minnesota*, 301

U.S. 234, 239 (1937) (the right of a state to tax property within its territorial jurisdiction is inherent and an attribute of sovereignty). Even where a concern exists regarding a risk of foreign retaliation over a state's taxation authority, the longstanding history of the right permitting "the States [to] tax as they please" is favored over a "particular risk of retaliation." *Barclays Bank Plc.*, 512 U.S. at 322; see also *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983) (finding that Congress generally has "declined to give its consent to" treaties that would impose "tax restriction[s] to the States").

Second, congressional inaction forecloses pre-emption of state taxation authority. *Barclays*, 512 U.S. at 322. In *Barclays*, the Court found that neither the statute nor the agency's action had any pre-emptive force because Congress failed to enact legislation designed to expressly regulate state taxation. Id. Especially when pre-emption of state and local taxation authority is at stake, *Barclays* highlighted that there must be a "specific indication . . . of congressional intent." Id., at 323; see also *Maine v. Taylor*, 477 U.S. 131, 139 (1986) (requiring an "unambiguous indication of Congressional intent"); *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 373 (1994) (requiring sufficient clarity of congressional intent to strike down state taxes); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982) (finding that courts are not free to support an invalidation of state tax law unless Congress had acted). Furthermore, in *Barclays*, state taxation authority was upheld where there was a passive indication that federal law would not be impaired by the

state practices. *Barclays*, 512 U.S. 298 at 323; see also *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 75 (1993) (upholding taxation where the Court could draw the inference that the taxation was permitted to remain in place); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979) (emphasizing that a passive indication was enough to permit state taxation).

In the present case, state and local taxation authority outweighs federal pre-emption. Taxation is not mentioned in the text of the statute itself, and as a result, a strong respect must extend to the prerogative of the City of New York to tax "every species of property," as stated in *Maguire*. 87 U.S. at 42. In the court of appeals' examination of the legislative history, the Senate Governmental Affairs Committee acknowledged "concerns within Congress that the FMA would empower the State Department to preempt affirmatively a variety of state and local laws *including tax laws*." See *City of New York*, 618 F.3d at 188 (emphasis added). Congress then subsequently modified the bill to limit the agency's pre-emptive authority. Id.[3] This concern of Congress, along with its silence as to the taxation issue within the statutory text, indicates a lack of specific intent to pre-empt as required by *Barclays*.

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[3] *Amici* National League of Cities and United States Conference of Mayors objected, during Congress's deliberations, to broad pre-emption language in the draft bill. See Foreign Missions Act of 1982, S. Rep. No. 97-329, 97th Cong., 2d Sess, at 43-44 (1982). The pre-emption language was thus altered to what now appears in section 4307.

It also suggests Congress's recognition that federal law would not be impaired by permitting state taxation practices to continue.

Further, the court of appeals incorrectly reasoned that the "need for the Nation to speak with one voice" with respect to foreign affairs subjected state tax laws to pre-emption. Id. at 188. As this Court held in *Barclays*, the risk of foreign retaliation, to which the court of appeals alluded, is not a valid reason for preemption of state taxation authority. In addition, the FMA is no exception to this Court's finding in *Container Corp. of America* that Congress has repeatedly declined to consent to treaties that restrict state taxation authority. Thus, the need to speak with one voice is not cause for pre-emption of the states' sovereign right to levy taxes.

Although the court of appeals relied on various implications within section 4307 as to the Secretary's authority, it departed from well-settled precedent (specific to state taxation authority) that is against a finding of pre-emption. The Second Circuit failed to find the requisite specificity of congressional intent and drew an improper inference from Congress's silence on the issue. While the court of appeals pointed to certain House and Senate reports mentioning "[t]he problem of taxation of diplomatic personnel [as] particularly vexing," this finding does not show an unambiguous intent by Congress to preempt taxation authority. H.R. Rep. No. 97-102, Pt. 1, at 26 (1981). Instead, these references to the "vexing problem" that taxation poses may, in fact, strengthen the presumption against pre-emption.

Moreover, the court of appeals made a false assumption finding that there was "no doubt" as to Congress's intent to provide the authority for the agency to pre-empt State and local tax laws. See 618 F.3d at 188. The relevant inquiry is whether the language of the statute expresses Congress's unambiguous intent. The lower court's finding that "[section 4307] is tellingly silent with regard to state and local tax laws" incorrectly ascribes the lack of a direct preclusion of pre-emptive authority as enough to justify pre-emption. Id. This line of reasoning runs contrary to the requirement of a clear indication of congressional intent. In fact, the lack of preclusion can only support local and state taxation authority.

Relying on a broad delegation of discretion to the Secretary is simply not sufficient to invalidate state taxation authority. This Court's precedents, most notably *Barclays*, treats state taxation authority with a special level of respect. As such, the sovereign right of the states to impose taxes outweighs the federal foreign relations implications, and the lack of specific congressional intent dispels pre-emption. Therefore, the court of appeals gave improper deference to an agency interpretation giving pre-emptive effect of state and local taxation authority.

This Court should grant the petition for writ of certiorari to clarify the intended scope of the FMA and of agency pre-emptive power. As Congress has heretofore recognized, effective protection of public health, safety, and welfare depends on a stable income base for government services. If the Second Circuit's decision stands, state and local police power will be

encumbered by the possibility of the loss of tax support through federal agency pre-emption. Congress specifically limited its grant of authority in the FMA to avoid such a disruption of state and local authority. The Secretary of State may not pre-empt local tax authority under the FMA without an explicit mandate from Congress.

III. THE PETITION SHOULD BE GRANTED TO SETTLE SIGNIFICANT ISSUES OF STATUTORY CONSTRUCTION FOR TAX PRE-EMPTION

Whether to give deference to a federal agency's interpretation of a statute, which seeks to pre-empt state and local tax law, is an important issue of statutory construction. This Court has consistently encouraged careful consideration of federal laws that interfere with state and local tax authority. See *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981) (quoting *Dows v. Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.")). Here, the Secretary of State's *ad hoc* Notice frustrates state and local operations that rely so heavily on consistency and predictability.

If the lower court's decision is allowed to stand, this Court will permit the Second Circuit to

significantly distort well-established pre-emption jurisprudence. See, *supra*, part II. The presumption against pre-emption has played an important role in statutory interpretation in the lower courts and this Court can offer significant guidance to lower courts by addressing its use in the present case.

In order to provide state and local governments with the clarity required for efficient governance, this Court should grant the petition for writ of certiorari. Congress specifically chose to leave a broad swath of state functions unencumbered by the FMA and the most reasonable interpretation of that statute – the one rejected by the court below – does not give the Secretary the power she has declared.

The court of appeals' decision, if left undisturbed, will not just affect the ability of New York City to collect property taxes on certain categories of foreign mission residences. The impact of the ruling – and the broad power it grants to the Secretary of State in pre-empting local taxation authority – will be felt in dozens, if not hundreds of municipalities around the country, wherever there might be a foreign embassy, mission or consulate. See S. Rep. No. 97-329, *supra*, at 44-45 (list of municipalities hosting foreign missions, as of 1981); U.S. Department of State, Foreign Consular Offices in the United States (Summer 2007), http://www.state.gov/documents/organization/91446.pdf (visited Dec. 4, 2010) (indicating dozens of cities where consulates with career personnel (not honorary consuls) are based).

Amici represent cities and communities that rely heavily on taxes to support and enhance the well-being

of millions of citizens. These communities thrive based on a clear understanding of their powers. The decision below places these powers at the mercy of federal agency action without regard to congressional intent. This Court has the opportunity to dispel this uncertainty and to provide clear guidance in an area of great importance to the broader scheme of federalism.

CONCLUSION

The petition ought to be granted.

Respectfully submitted,

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